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91-1315

No. 91-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PAUL S. MIRMAN,

Petitioner,

—v.—

GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

MELVIN L. WULF
Counsel of Record
BELDOCK LEVINE & HOFFMAN
99 Park Avenue
New York, New York 10016
(212) 490-0400

Attorney for Petitioner

MYRON BELDOCK
BRIAN MAAS
Of Counsel

QUESTION PRESENTED

Whether the due process clause permits a supervisory attorney to be disbarred for "neglect of a legal matter entrusted to him" when he was not personally responsible for any of the alleged acts of neglect and did not know and could not reasonably have known of their occurrence, and where the controlling statute gave no fair notice that a supervisory attorney could be disbarred in such circumstances.

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

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No. 91-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

PAUL S. MIRMAN,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

OPINIONS BELOW

The order of the Court of Appeals of the State of New York is reported at 78 N.Y.2d 1042, 576 N.Y.S.2d 210, and appears in the Appendix, infra, pp. 1a-2a. The opinion and order of the Appellate Division of the Supreme Court of the

State of New York, Second Department, is reported at 167 A.D.2d 60, 569 N.Y.S.2d 981 and appears in the Appendix, infra, pp. 3a-21a. The administrative Report of the Special Referee, which is unreported, appears in the Appendix, infra, pp. 22a-249a.

JURISDICTION

The order of the New York State Court of Appeals dismissing petitioner's timely appeal as of right and denying petitioner's timely motion for leave to appeal was entered on October 15, 1991. A timely application to extend the time to file this petition for certiorari was granted by Justice Thomas on January 2, 1992, and the time was extended to February 14,1992. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 on the grounds that a right is claimed under the Constitution, and that the validity of a statute of the State of New York is drawn into question for being repugnant to the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Disciplinary Rule 6-101 provides:

> DR 6-101. Failing to Act Competently
>
> (A) A lawyer shall not:
>
> (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

STATEMENT OF THE CASE

Statement of Facts

The important issue raised by this case is whether petitioner's due process rights were violated by his disbarment from the practice of law for "neglect [of] a legal matter entrusted to him," when he was not personally responsible for any of the neglectful acts and had no knowledge of them. If the Disciplinary Rule that was the basis of his disbarment permits his disbarment under the circumstances of this case, it is petitioner's claim that it is unconstitutional on its face or as applied to him.

Starting out as a solo practitioner in 1973 when he succeeded to the practice

of a deceased attorney, petitioner (hereafter Mr. Mirman) began hiring additional lawyers in 1979 to keep pace with a growing practice (R.1873-75).[1] By 1984 his staff had grown to nine lawyers. At the time of his disbarment the firm employed twelve lawyers, as well as law clerks responsible for specific tasks such as calendars, examinations before trial and physical examinations.

To cope with a rapidly expanding caseload and the additional lawyers hired to help run his office, Mr. Mirman had adopted various and increasingly sophisticated systems to manage the caseload since the early 1980s. The firm initially relied on a system of regular file reviews, office diaries and daily calendars setting forth court assignments for all lawyers (R.835-839). It later developed a computer system to record the

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[1] "R." refers to the three volume Record Below that was filed with the Court of Appeals.

results of all court appearances, and to track important deadlines and dates for all lawyers in the firm (R.1513-1516). In 1986 the firm reduced its intake of new cases by 30%-50%, concentrating on more significant claims (R.832).

The eight charges brought against Mr. Mirman by the Grievance Committee, which resulted in his disbarment, related to the early 1980s. This was a period when the firm's caseload was growing rapidly, requiring Mr. Mirman for the first time to delegate responsibility to other lawyers. None of the charges involved conduct by Mr. Mirman personally. They were based largely on court decisions concerning the dismissal or restoration of cases brought by Mr. Mirman's firm which the Grievance Committee criticized in hindsight and characterized as demonstrating a "pattern of neglect." The facts underlying these decisions were uncontroverted, and at the Grievance Committee hearing witnesses from Mr.

Mirman's firm explained each case fully. The Committee called no witnesses to support any of its charges of neglect, nor was proof offered of any client dissatisfaction with Mr. Mirman or his firm.

For purposes of analysis, the eight charges may be broken down into three categories.

Two charges (numbered I and VI in the Appellate Division opinion) arose out of events when Mr. Mirman was ill and unable to handle cases or to supervise others. In late 1980 he was stricken with Guillain-Barre syndrome, an auto-immune disease affecting the peripheral nervous system for which no cure exists (R.1878-1884). After discharge from the hospital, Mr. Mirman underwent a long, arduous rehabilitation process, which included re-learning to walk. He was not back at work full-time until the fall of 1981 (R.1737). During his absence Mr. Mirman left the office in the charge of

Joseph Levine, an experienced trial lawyer (R.1666-67, 1898).

Charge I (Kantor) related to a case brought in 1979 in which all pleadings had been exchanged and discovery completed by June 1980 (R.1891-92; PX 3). In late 1980, when Mr. Mirman was ill and out of the office, the case was transferred from Supreme Court to the Civil Court (R.1676-77. 1891).[2] Mr. Levine, who left the firm in 1982, made no notation of the transfer in the firm's record file, and Civil Court sent no notice of any further calendar calls (R.862-867). During regular office reviews of ongoing litigation, Mr. Mirman's staff assumed that the case was still in Supreme Court awaiting a trial date (R.913-917, 1891-92). After a client inquiry to the firm and to the Grievance Committee, counsel inquired at court and discovered that the

[2] The Supreme Court in New York State is the original court of general jurisdiction. Civil Court is an original court of lesser jurisdiction.

case had been transferred but that through an error in the clerk's office no updated calendar dates had been provided (R.862-867, 1735-36). The case was subsequently given a new trial date on the Civil Court's trial calendar, and the client obtained a settlement of $6,750 (R.860-61, 1739; RX D).

Charge VI (Zaldua) involved an action brought in 1979. After adjournments of plaintiff's deposition by mutual consent, new dates were scheduled by court order in the spring and summer of 1981 when Mr. Mirman was ill and out of the office (R.1426, 1613; PX 75-77). No attorney appearance was entered, and Mrs. Zaldua, the client, failed to appear on the final date because of her departure for her native Colombia without informing counsel (R.1426-27; PX 80b). Her case was then dismissed. When Mrs. Zaldua returned the next year, she asked counsel to reopen her default. Mr. Mirman, who by that time was back in the office,

promptly attempted to do so, assuming responsibility for the client's delay so as to avoid a finding of abandonment by the client (R.1428-29; PX 82). Although the trial court granted the relief, the Appellate Division dismissed the case for failure to prosecute on grounds of both law office failure and plaintiff's abandonment of her claim (Ibid.). No complaint about the handling of the case was ever made by Mrs. Zaldua.

Three charges (II, IV and V) related to the exercise of reasonable legal judgment by others in Mr. Mirman's firm that proved erroneous. The supposed neglect in charges II (Castillo) and IV (Montana) related in part to the failure to take a default judgment within one year of defendant's default.

Castillo (II) was an action brought in 1981 in which a default judgment against the defendant was not taken within one year of defendant's failure to answer. Defendant then moved to dismiss

for abandonment. This motion was granted on default when one of Mr. Mirman's employees arrived at court too late to answer the calendar call (R.1689-90). The firm promptly moved to vacate the default. The court granted relief and found that plaintiffs had not abandoned but had pursued the case through correspondence with the defendant seeking an answer to the complaint (R.1689-90; PX 19). The litigation, later dismissed because the court found plaintiffs' affidavit of merit insufficient, was ultimately mooted by the commencement of uninsured motorist arbitration which defendant settled with plaintiffs for $10,000 (R.929, 963-970, 1694; RX G1-G4).

Montana (IV) was a suit brought in 1978 against a landlord by an infant plaintiff. Although the defendant failed to answer, a default judgment could not be taken because the plaintiff could not be located to verify the complaint or to participate in an inquest after defen-

dant's default (R.1200-01; PX 55). The client has not been heard from to this day (R.1366, 1764). The main focus of "neglect" charges in the Montana case related to a title report. The 1978 title report on which Mr. Mirman relied showed the landlord as the owner of the property (R.1195-96). In 1981 Thomas Markovits, an attorney on Mr. Mirman's staff, commissioned a new title report which showed transfer of title to the city. Mr. Markovits thereupon made a motion to file a late notice of claim to protect the absent client's interest (R.1211-13, 1755-59). The 1981 title report was subsequently found to be in error, for title had in fact passed from the city back to the landlord in 1976, two years before the accident (R.1211, 1758-59; RX S). A decision by the Appellate Division disallowing the late notice of claim thus turned out to be irrelevant and moot.

Dodge (V) arose out of a decision by Mr. Markovits in 1982 not to file a bill of particulars in a case against a public body, which the defendant had claimed to be a nullity in its answer because of the failure to hold a hearing under the General Municipal Law. Mr. Markovits responded to this defense by participating in a municipal hearing and then filing a superseding action not subject to the defense (R.1767-72; PX 59a). Mr. Markovits also concluded that he need not file a bill of particulars in the first action. The court disagreed with Mr. Markovits's conclusion, held that the first action was not a nullity, and dismissed plaintiff's claim on the merits for failure to provide the bill of particulars. The client was subsequently paid $5,000 by Mr. Mirman's firm in a malpractice settlement (R.1409-1410).

The judgment exercised in each of these three cases was supportable. Where problems arose during the course of liti-

gation, Mr. Mirman later took steps to ensure that the clients' interests were adequately protected. In none of the cases was Mr. Mirman himself responsible for any of the events said to be acts of neglect, nor did he have any knowledge of them.

The three other charges related to clerical errors made in filings or appearances. Charge III (Lugardo) concerned the late preparation and filing of a bill of particulars by a firm employee in 1983, which led to dismissal of plaintiff's case (R.1051-55; RX I). The client was advised to retain separate counsel and was ultimately paid $5,000 in a malpractice settlement (R.1180-81; RX P2). Charge VII (Austin) involved late attendance by a clerk at a calendar call in 1983 and an unsuccessful attempt to reinstate the case, which the court rejected because of the submission of an unexecuted affidavit by the clerk (R.1459-1460, 1478-79, 1775). The client

was subsequently asked whether he wished to pursue the case with a further submission, and the client said he did not (R.1782-83). Charge VIII (Gonzalez) related to an automobile accident case in which Mr. Mirman's office was gathering documentary evidence to support a reference to uninsured motorist arbitration (R.1491-93). A clerk dispatched to court in 1983 to explain the status of the case and to seek an adjournment went to the wrong courtroom which resulted in a default (R.1493-94). The default was later vacated, sanctions were assessed and paid, and the case ultimately went to arbitration, where the client recovered $8,500 (R.893; RX AQ, AR, AS).

Based on those facts, the Special Referee found that Charges I, III, V, VI and VIII were proven by a preponderance of the evidence, and that Charges II, IV and VII had not been proven by a preponderance of the evidence (Appendix, infra, pp. 248a-249a).

The Appellate Division, Second Department, upheld the Special Referee's findings as to Charges I, III, V, VI and VIII, reversed his findings as to Charges II, IV and VII, and ordered Mr. Mirman disbarred (Appendix, infra, pp. 18a-20a).

Upon petitioner's disbarment by the Appellate Division, and in anticipation of filing an appeal as of right and a motion for leave to appeal in the Court of Appeals, counsel conducted a survey of approximately 700 attorney disciplinary cases reported in New York State since 1983, including all disbarments, all suspensions, and all cases in which neglect was among the charges. The details of the survey were compiled and included in petitioner's Memorandum in Support of Jurisdiction As of Right Under CPLR 5601(b) Or, Alternatively, By Permission Under CPLR 5602, pp. 27, 29, Annex.

The survey established on three bases that petitioner's disbarment was without precedent and discriminatory: it

was the only case in which an attorney was disbarred without any allegation of any sort of venality, scienter or a criminal conviction; the only case in which an attorney was disbarred solely on the ground of neglect, without any more serious element of misconduct; and the only case in which a supervisory attorney was disbarred solely for the alleged misconduct of other persons.

The Court of Appeals dismissed petitioner's appeal as of right and denied his motion for leave to appeal without opinion (Appendix, infra, pp. 1a-2a).

How The Federal Constitutional Claims Were Raised

Petitioner's Answer to the Grievance Committee's Petition asserted as Affirmative Defenses that "To the extent that Respondent is being charged for acts which he did not commit, he is being deprived of his due process rights" (Answer ¶ 47; R.200); "That the Petition is

in violation of Respondent's due process rights, in that the charges are unconstitutionally vague and are void for vagueness" (Answer ¶ 71; R.207); and that "Respondent is deprived of equal protection of the laws..." (Answer ¶ 72; R.207).

The constitutional claims asserting the denial of due process were raised again before the Appellate Division (R.390-400, 456). The same due process claims, and the new equal protection claim that arose from the Appellate Division's order of disbarment, were raised before the New York Court of Appeals (Respondent-Appellant's Memorandum In Support of Jurisdiction as of Right Under CPLR 5601(b) or, Alternatively, By Permission Under CPLR 5602, pp. 14-23; Statement Pursuant to Court of Appeals Rule 500.2, pp. 2, 5, 7-10, 11-14).

REASONS FOR GRANTING THE WRIT

This case raises the important question, which has never been but should be settled by this Court, whether a supervisory attorney may be disbarred for acts of neglect committed by others without his knowledge, and which he could not reasonably have known about. Petitioner's disbarment in such circumstances strips him of his right to practice his profession when he was completely innocent of any personal wrongdoing. It is a harsh result that cannot be tolerated by the due process clause.

This Court held in Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239 (1957), that "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." The Court has reaffirmed the same principle repeatedly for

thirty years. See Willner v. Committee on Character, 373 U.S. 96, 102 (1963); Re Ruffalo, 390 U.S. 544, 550 (1968); Baird v. Arizona, 401 U.S. 1, 8 (1971); In Re Snyder, 472 U.S. 634 (1985). See too Gentile v. State Bar of Nevada, 501 U.S. ___, 115 L.Ed. 2d 888 (1991).

In this case, the New York courts based petitioner's disbarment on New York Disciplinary Rule 6-101(A)(3), which states that "A lawyer shall not ... Neglect a legal matter entrusted to him."[3]

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[3] The Grievance Committee's petition initiating the proceedings alleged violations of DR 1-102(A)(1), (5) and (6) and 7-101(A)(1) and (2), as well as 6-101(A)(3) (R.176-185). The relevant portions of DR 1-102 and 7-101 are set out in the Appendix, infra, pp. 250a-251a.

The Special Referee's Report (Appendix, passim) did not specifically relate his factual findings to any of the several Disciplinary Rules cited above. However, the Grievance Committee's Proposed Findings and Conclusions introduced its discussion of each of the eight charges with the statement that "Respondent neglected a legal matter entrusted to him

(continued...)

But the facts show that of the eight matters that were the basis for the charges of neglect against petitioner, he neither was responsible for nor knew of any of them. He was absent from his office because of a prolonged serious illness when two of them occurred (supra, p. 8), three of them were not acts of neglect at all but grew out of decisions taken by others on legal grounds (supra, pp. 11-15), and three others grew out of law office mistakes committed by others in which the clients in fact suffered no harm (supra, pp. 15-16).[4] The facts also show that,

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[3](...continued)
as follows:..." (R.218, 224, 231, 240, 246, 250, 255, 262). And the opening paragraph of the Appellate Division's opinion states that "Each of the eight charges allege the respondent's neglect of clients' personal injury matters entrusted to him" (Appendix, infra, pp. 4a-5a), and refers in its opinion only to respondent's "neglect." Appendix, infra, pp. 16a, 17a.

[4] The Special Referee in fact found that Charges II, IV and VII had not been proven. The Appellate Division upset those findings.

in order to avoid errors, petitioner's firm radically reduced its intake beginning in 1986 (supra, p. 7), after the events involved in the eight charges at bar and before charges were initiated by the Grievance Committee.

As to each alleged act of neglect, the critical facts are that petitioner was not personally responsible for and had no knowledge of any of them.

During the time that each of the eight events occurred, New York had no Disciplinary Rule that explicitly addressed the nature of a supervisory attorney's responsibility for matters in the hands of other lawyers or non-lawyer employees in a firm.[5] Such a rule was

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[5] At the time of the events involved at bar, the New York case law on the subject of supervisory responsibility was sparse, but clearly tended to require personal responsibility or knowledge in order to penalize a supervisory attorney. In Re Wilson, 170 N.Y.S. 725, 729 (2d Dep't 1917), had held that a lawyer is generally "not guilty of professional misconduct ... because a partner or clerk

(continued...)

adopted on September 1, 1990 in New York's new Code of Professional Responsibility. It provides:

> DR1-104, Responsibilities of A Supervisory Lawyer:
>
> A. A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if:
>
> (1) The lawyer orders the conduct; or
>
> (2) The lawyer has supervisory authority over the other lawyer or the non-lawyer, and knows or should have known of the con-

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[5](...continued)
is guilty of professional misconduct, which he has not authorized, and of which he has no knowledge." In Re Neimark, 13 A.D.2d 676, 677 (2d Dep't 1961), had held that a lawyer may be answerable "for his own carelessness and failure to supervise adequately the operations of his office." In a later case, In Re Kraft, 148 A.D.2d 149, 150 (1st Dep't 1989), the Appellate Division, First Department, declined to disbar an attorney for neglect where it had resulted in part from "the unauthorized actions of one of his employees."

duct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The upshot of the factual circumstances underlying petitioner's disbarment is that petitioner was held responsible for unauthorized acts of others of which he had no knowledge. Consequently, he has been deprived of the right to practice his profession by application of a standard by the New York courts that violated two basic precepts of the due process clause of the Fourteenth Amendment: first, his disbarment without fault is a denial of due process; second, his disbarment without fair notice of the nature of an ethical violation is also a denial of due process. It also violated the equal protection clause.

1. Due process requires a showing of fault as a condition of disbarment.

As this Court has noted, "the right to work for a living in the common occu-

pations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." Truax v. Raich, 239 U.S. 33, 41 (1915). This constitutional protection clearly extends to a person's right to practice law. Schware v. Board of Bar Examiners, supra. See also In re Ruffalo, 390 U.S. 544 (1968), which held that disbarment is a "quasi-criminal" proceeding in which an attorney is entitled to procedural due process. In determining whether a person may be admitted to practice law or deprived of his license, the states' standards must "have a rational connection with the applicant's fitness or capacity to practice law." Schware, supra at 239. As the Court noted in Konigsberg v. State Bar, 353 U.S. 252, 273 (1957),

> We recognize the importance of leaving States free to

> select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner....

In the proceeding below, the Appellate Division automatically attributed the alleged errors of subordinates to petitioner and ordered him disbarred. A rule which totally ignores the extent of petitioner's personal involvement in alleged misconduct is arbitrary and irrational, for it results in petitioner's disbarment without fault, which is forbidden by the due process clause. Holdings in a number of different contexts illustrate the application of the principle.

In Bearden v. Georgia, 461 U.S. 660, 665-67, 672-73 (1983), the Court held that standards of fundamental fairness embodied in the Fourteenth Amendment are violated when a court automatically revokes petitioner's probation without examining the facts and circumstances underlying his alleged default. Douglass

v. Buder, 412 U.S. 430 (1973), held that the due process clause is offended when a court revokes probation with no evidence of any violation by the petitioner. Likewise, Lambert v. California, 355 U.S. 225, 228 (1957), emphasized that due process was violated by the prosecution of mere passive conduct.

The Court has also held that a court may not dismiss a civil complaint for plaintiff's failure to comply with an order when it is established that his failure was due to "inability, and not to willfulness, bad faith, or any fault of petitioner." Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 212 (1958).

To disbar a lawyer without a showing of personal fault serves no valid disciplinary purpose, offends elementary standards of fairness, and is precisely the sort of arbitrary and capricious state

action that the due process clause forbids.

2. Due process requires fair warning of the scope of ethical prohibitions.

The due process clause requires that proscriptions be "clearly defined." Grayned v. Rockford, 408 U.S. 104, 108 (1972):

> [B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.

Prohibitions which fail the "clearly defined" test not only "trap the innocent by not providing fair warning" but (Id. at 108-109):

> impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

A statute or rule which fails to provide such notice is void for vagueness, Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972), for "'The dividing line between what is lawful and unlawful cannot be left to conjecture.'" Connally v. General Construction Co., 269 U.S. 385, 393 (1926).

DR 6-101(A)(3) on its face is devoid of any hint that it imposes ethical responsibility on the titular head of a firm for the alleged conduct of firm employees. No reasonable attorney, familiar with the Code and its ethical strictures, would have notice of what conduct is proscribed under DR 6-101(A)(3) as applied below. An attorney could only "guess at [the rule's] contours ... and has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated." Gentile v. State Bar, 501 U.S. at ___, 115 L.Ed. 2d at 906-907.

The Appellate Division violated these precepts by establishing an unprecedented standard of vicarious liability in this disbarment proceeding without any prior notice.

3. Petitioner's disbarment violated the equal protection clause.

The equal protection clause of the Fourteenth Amendment "announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle. Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle is violated arise." New York City Transit Authority v. Beazer, 440 U.S. 568, 587-88 (1979). The equal protection clause also prohibits "general rules ... being applied in an arbitrary and discriminatory way."

Jones v. Helms, 452 U.S. 412, 423-24 (1981).

As shown supra, pp. 17-18, of 700 attorneys who were disciplined in New York State since 1983, petitioner is the only one to be disbarred solely for acts of neglect committed by others but attributed to the attorney, where there was no accompanying criminal conviction, venality, other serious act of misconduct, or knowledge. Petitioner was therefore a victim of partiality, for the Appellate Division imposed a sanction upon him that it had not imposed on other attorneys who were in the exact same circumstances. Petitioner's disbarment sanction was therefore arbitrary and capricious, and a denial of equal protection.

The principle that the equal protection clause forbids different treatment of persons similarly situated is as old as Yick Wo v. Hopkins, 118 U.S. 356 (1886), and F.S. Royster Guano Co. v.

Virginia, 253 U.S. 412, 415 (1920), in which the Court held that a classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

The analysis presented to the court below demonstrated that petitioner was treated differently than all others in his circumstances. The Court should grant certiorari to decide whether such treatment, which deprived petitioner of the right to practice his profession, denied him the equal protection of the laws. The issue is all the more important because it intersects directly with the due process issues explicated above, for petitioner was a victim of arbitrary treatment by the courts below, and the ultimate sanction of disbarment was imposed without any notice that acts of neglect by others, without petitioner's knowledge, could ever lead to disbarment.

The adoption in 1990 of DR 1-104, which addresses the scope of supervisory responsibility, indicates recognition of the ambiguity and vagueness of DR 6-101(A)(3) standing alone. DR 1-104 is based on ABA Model Rule 5.3, which, however, concerns supervision only of "non-lawyer assistants." See ABA/BNA Lawyers' Manual On Professional Conduct, 21:8601 et seq. The importance of granting certiorari in this case is emphasized because of the ABA Model Rule and the recent adoption of DR 1-104 by New York. Encouragement by the ABA of adoption of its standard for supervisory responsibility will surely persuade other jurisdictions to adopt such a rule, or some variation. This Court's early determination in this case of the standards required by due process as a condition of disbarment in the context of an attorney's supervisory responsibility over lawyers and non-lawyers will assist the bar, the

states' disciplinary bodies and the courts in their construction and application of this aspect of the disciplinary rules.

CONCLUSION

For the reasons stated above, the writ of certiorari should be granted.

Respectfully submitted,

Melvin L. Wulf
Counsel of Record
BELDOCK LEVINE & HOFFMAN
99 Park Avenue
New York, New York 10016
(212) 490-0400

Myron Beldock
Brian Maas
Of Counsel

February 1992

APPENDIX

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifteenth day of October A.D. 1991

PRESENT, HON. SOL WACHTLER, Chief Judge, presiding.

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2 Mo. No. 929
In the Matter of Paul S. Mirman, an attorney and counselor-at law, admitted under the name of Paul Mirman.
Grievance Committee for the Second and Eleventh Judicial Districts,

Respondent,

Paul S. Mirman,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, the appeal taken as of right be and the same hereby is dismissed, without

costs, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied.

Judge Bellacosa took no part.

Donald M. Sheraw
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION :
SECOND JUDICIAL DEPARTMENT

___ A.D.2d ___

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
RICHARD A. BROWN
THOMAS R. SULLIVAN, JJ.

90-10091

In the Matter of Paul S. Mirman,
OPINION & ORDER
an attorney and counselor-at-law,
admitted under the name of Paul Mirman.

Grievance Committee for the Second and
Eleventh Judicial Districts, petitioner;
Paul S. Mirman, respondent.

DISCIPLINARY proceeding instituted by the Grievance Committee for the Second and Eleventh Judicial Districts. The respondent was admitted to the Bar on March 19, 1969, at a term of the Appel-

late Division in the Second Judicial Department, under the name Paul Mirman. By order of this court dated October 7, 1988, the issues were referred to J. Mitchell Rosenberg, Esq., as Special Referee to hear and report.

Robert H. Straus, Brooklyn, N.Y. (Robert J. Saltzman of counsel), for petitioner.

Beldock Levine & Hoffman, New York, N.Y. (Myron Beldock of counsel), for respondent.

PER CURIAM. The respondent was admitted to the Bar on March 19, 1969, at a term of the Appellate Division in the Second Judicial Department, under the name Paul Mirman. In this proceeding the respondent was charged with eight allegations of professional misconduct. Each of the eight charges allege the

respondent's neglect of clients' personal injury matters entrusted to him.

Charge one alleged that the respondent was retained in or about December 1978 and placed the matter on the calendar in Supreme Court, Kings County, in June 1980. The matter was transferred to the Civil Court. Thereafter, the respondent failed to proceed further with the case for a period of approximately two years and failed to take any steps to remedy the situation until he was notified by the petitioner Grievance Committee of the client's complaint of professional misconduct.

Charge two alleged that the respondent was retained in 1980 and served a summons and complaint in October 1981. Although there was no appearance or answer by the defendant, the respondent

failed to institute proceedings for the entry of a default judgment within the statutory time period. In June 1983 the defendant moved to dismiss the case for failure to move for leave to enter a default judgment within one year of the default in answering. The respondent failed to appear in Supreme Court, Kings County, in opposition to the defendant's motion to dismiss and the motion was granted on his default. The court subsequently agreed to relieve the respondent of the default, conditioned upon his submitting an affidavit of merit. The action was ultimately dismissed due to the respondent's failure to provide a sufficient affidavit of merit.

Charge three alleged that the respondent was retained in November 1982 and served a summons and complaint upon

the defendant. In April 1983 the defendant served the respondent with a demand for a bill of particulars and on or about August 5, 1983, the defendant moved to preclude the plaintiff. On September 12, 1983, a conditional order of preclusion was entered in the Supreme Court, Kings County, on consent, allowing service of the bill of particulars within 60 days. The respondent's bill of particulars, which was served after the 60-day period, was rejected by the defendant. Thereafter, the respondent's motion, dated March 14, 1984, to extend the time in which to serve the bill of particulars, was denied and the defendant's cross motion for summary judgment was granted. The order of the Supreme Court, Kings County, dismissing the respondent's complaint was affirmed by this court (see,

Lugardo v. Folkes, 110 AD2d 756). The respondent failed to notify his clients of the dismissal of their action until after he was contacted by the petitioner Grievance Committee.

Charge four alleged that the respondent was retained in September 1978 to represent an infant and served a summons and complaint on October 13, 1978, upon the purported owner of the premises where the accident occurred. When no answer was forthcoming, the respondent failed to move for the entry of a default judgment within the statutory time period. In October 1981 the respondent learned that the property in question had been owned by the City of New York at the time of the accident. Thereafter, the respondent moved for leave to serve a late notice of claim upon the City of New York. This

court reversed Special Term and denied the respondent's motion for leave to serve a late notice of claim (see, Montana v. City of New York, 96 AD2d 1031), and the cause of action was ultimately dismissed.

Charge five alleged that the respondent was retained in June 1981 and served a summons and complaint upon the New York City Housing Authority in February 1982. On April 6, 1982, the defendant served an answer and demand for bill of particulars upon the respondent. The respondent failed to provide a bill of particulars as demanded. On July 30, 1982, a 60-day conditional preclusion order was entered against the respondent. The respondent failed to comply with this preclusion order. As a result, on March 22, 1983, summary judgment was granted on default

in complying with the conditional order of preclusion and the complaint was dismissed. The granting of summary judgment was affirmed by this court (see, Dodge v. New York City Hous. Auth., 109 AD2d 717).

Charge six alleged that the respondent was retained by a client after she was injured by a bus owned by the Metropolitan Suburban Bus Authority. The respondent commenced an action on March 13, 1979, and issue was joined on April 3, 1979. Thereafter, the respondent failed to diligently prosecute the matter. On December 28, 1981, the Supreme Court, Nassau County, granted the defendant's motion to dismiss the action upon the grounds of failure to prosecute and failure of the plaintiff to comply with an order of the court. The respon-

dent failed to oppose the motion to dismiss. On December 3, 1982, the respondent obtained an order conditionally reinstating the action. This court reversed and ordered that the action be dismissed, citing "over three years of laxity and neglect on the part of the plaintiff's attorneys" (Zaldua v. Metropolitan Suburban Bus Auth., 97 AD2d 842, 843).

Charge seven alleged that the respondent was retained in August 1982 and thereafter filed an uninsured motorist claim, resulting in an arbitration hearing being scheduled in the Supreme Court, Queens County, for November 12, 1983. The respondent failed to appear on the schedule date, all issues were resolved against the respondent's client, and the arbitration of the client's claim was

"forever stayed." On January 23, 1984, the respondent's motion to vacate that determination was denied without prejudice and with leave to renew upon submission of a transcript of the November 22, 1983, proceeding and the submission of an affirmation from the attorney assigned to the case setting forth a valid excuse for his failure to appear both at the calendar call and the trial part. The respondent's renewed motion was denied by order of the Supreme Court, Queens County, dated April 25, 1984. The court found the excuse offered for the nonappearance of the attorneys to be "grossly inadequate" and an example of "unexcusable law office failure," which was compounded by the submission of an unexecuted affirmation. This court affirmed that order

(see, Matter of American Sec. Ins. Co. v. Austin, 110 AD2d 697).

Charge eight alleged that the respondent was retained in 1981 and thereafter filed an uninsured motorist claim, pursuant to his client's insurance policy. The client's insurance carrier sought and obtained a stay of arbitration. The case appeared on the calendar of Supreme Court, New York County, on June 3, 1983, on the issue of whether the offending vehicle was insured. After several adjournments at the respondent's request, the case was marked "final" for October 24, 1983. On that date, the respondent requested and received another continuance, to November 23, 1983. The respondent was advised "that a failure to appear and proceed on that date would result in the granting of the carrier's

requested relief." The respondent failed to appear on November 23, 1983. As a result, a permanent stay of arbitration was granted. The Appellate Division, First Department, vacated the default in appearing at the hearing, but noted "with disfavor the deliberate flouting of the rules of Part XI by [the respondent] and would agree that such dilatory conduct is inimical to the orderly administration of a Trial Calendar" (Matter of Nationwide Ins. Co. v. Gonzalez, 108 AD2d 637, 638). The respondent was directed to personally pay costs in the amount of $1,000 to the other party.

The Special Referee sustained charges one, three, five, six and eight, and found that charges two, four and seven were not proven by a preponderance of the evidence.

The petitioner moves to confirm in part and disaffirm in part the report of the Special Referee and the respondent cross-moves to confirm in part and disaffirm in part the report. The petitioner seeks to disaffirm so much of the report as fails to sustain charges two, four and seven, and the respondent seeks to disaffirm so much of the Referee's report as sustained charges one, three, five, six and eight.

As to charge two, the respondent argues, inter alia, that he obviated the necessity of moving for leave to enter a default judgment by electing to pursue an uninsured motorist claim which would provide the client with the same monetary benefit and a speedier disposition. The respondent was retained in 1980 and commenced an action in October 1981. Howev-

er, the respondent took no further action until after the defendant moved to dismiss in 1983 and, even then, failed to appear on the return date of the defendant's motion. The Special Referee failed to sustain charge two, primarily because there could be differing interpretations of an order denying the respondent's motion to vacate the dismissal of the action. Without addressing those interpretations and the mitigating circumstances resulting therefrom, there is ample evidence of neglect on the part of the respondent.

In failing to sustain charge four the Special Referee noted that after the respondent determined that the City of New York was the owner of the property in October 1981 he "expeditiously notices his late claim notice for November 30,

1981, but that it was adjourned several times at the request of both parties." Despite this, the record is clear that the respondent failed to move for leave to enter a default judgment against the original purported owner within the statutory time period and did not ascertain the City's ownership of the property until October 1981. He is therefore guilty of neglect.

As to charge seven, the Special Referee stated in his report that the "Respondent may have been somewhat 'slipshod' in this case but I am not convinced that he intended to pull the wool over the Court's eye - to 'deceive the court.'" The Special Referee failed to sustain this charge. The evidence nevertheless reveals that the respondent did neglect this matter. As noted by this

court, the "appellant failed to offer a valid excuse for his default, as required by CPLR 5015(a)(1)" (Matter of American Sec. Ins. Co. v. Austin, supra, at 697).

After reviewing all of the evidence, we are convinced that the respondent is guilty of all of the misconduct charged. The petitioner's motion to confirm in part and disaffirm in part the report of the Special Referee is granted. The respondent's cross motion to confirm in part and disaffirm in part is denied.

In determining an appropriate measure of disciplinar to be imposed, we are aware of the personal problems the respondent has experienced, but note the pattern of gross neglect demonstrated over a period of many years by the respondent, his blatant disregard for the rights of his clients, as well as the two

admonitions and five letters of caution imposed upon the respondent by the Grievance Committee, dating from September 16, 1975, to March 15, 1988. The respondent is guilty of serious professional misconduct and his hereby disbarred from the practice of law.

MANGANO, P.J., THOMPSON, BRACKEN, BROWN and SULLIVAN, JJ., concur.

ORDERED that the petitioner's motion to confirm in part and disaffirm in part the report of the Special Referee is granted; and it is further,

ORDERED that the respondent's cross motion to confirm in part and disaffirm in part the report of the Special Referee is denied; and it is further,

ORDERED that pursuant to Judiciary Law §90, effective immediately, the respondent Paul S. Mirman, is disbarred and his name is stricken from the roll of attorneys and counselors-at-law; and it is further,

ORDERED that the respondent shall promptly comply with this court's rules governing the conduct of disbarred, suspended and resigned attorneys (22 NYCRR 691.10); and it is further,

ORDERED that pursuant to Judiciary Law §90, effective immediately, the respondent Paul S. Mirman is commanded to desist and refrain (1) from practicing law in any form, either as principal or agent, clerk or employee of another, (2) from appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission or other public authority, (3) from giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) from holding himself out in any way as an attorney and counselor-at-law.

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPT.

I, MARTIN H. BROWNSTEIN, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on

May 20, 1991 and that this copy is a correct transcription of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on May 20, 1991.

/s/ Martin H. Brownstein

ENTER:

Martin H. Brownstein
Clerk

Report of Special Referee
J. Mitchell Rosenberg,
dated December 10, 1990

(pages 16-169)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of

PAUL S. MIRMAN,

an attorney and counselor-at-law,

GRIEVANCE COMMITTEE OF THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Petitioner,

- and -

PAUL S. MIRMAN,

Respondent.

REPORT OF J. MITCHELL ROSENBERG, SPECIAL REFEREE

TO THE JUSTICES OF
THE SUPREME COURT,
APPELLATE DIVISION,
SECOND DEPARTMENT

J. Mitchell Rosenberg
901 Avenue H
Brooklyn, N.Y. 11230
(718) 434-0711

By an order of reference dated October 7, 1988, this Court directed that the issues raised by the petition of the Grievance Committee for the Second and Eleventh Judicial Districts, verified on May 5, 1988, and by the answer of respondent, verified on June 8, 1988, be referred to the undersigned special referee to hear and report thereon.

Petitioner appeared by Dianna Maxfield Kearse, Esq. and Robert J. Saltzman, Esq., assistant counsel to Robert H. Strauss, Esq., chief counsel.

Respondent appeared initially with Nicholas C. Cooper, Esq. and subsequently with Jerome Karp, Esq.

The Charges

On March 19, 1969, respondent was admitted by this Court to the practice of the law.

Eight charges of professional misconduct as defined by Disciplinary Rules 1-102(A)(1), (5) and (6), 6-101(A)(3) and

7-101(A)(1) and (2) of the Code of Professional Responsibility, and by the Rules of the Appellate Division, Second Department governing the conduct of attorneys, Section 691.2, were lodged against respondent.

Charge I

Respondent neglected a legal matter in which he had been retained in or about December 1978 to represent Irma Kantor for the recovery of damages in a personal injury automobile accident case. The action was commenced and on June 6, 1980 was placed on the Supreme Court, Kings County calendar. Thereafter, it was transferred to the Civil Court. After the case failed to appear on the Civil Court calendar on an adjourned date, June 1, 1981, respondent failed to proceed further with the case for approximately two years. Respondent failed to take any remedial steps until after noti-

fication by the petitioner herein of Mrs. Kantor's complaint.

Charge II

In 1980, respondent was retained by Magdalia Castillo, et al., in an automobile personal injury case. On October 29, 1981, a summons and complaint were served. Although defendant did not appear or answer, respondent failed to institute proceedings for the entry of a default judgment within the prescribed statutory period. On June 20, 1983, the defendant moved to dismiss the case for failure to take a default judgment within one year of the default. This motion was granted on default. Subsequently, the court agreed to relieve respondent of his default, conditioned upon the submission of an affidavit of merit. Ultimately the action was dismissed due to respondent's failure to provide a sufficient affidavit of merit.

Charge III

In November 1982, respondent was retained by Ermelindo Lugardo, Maria Garcia, et al., to institute an action for personal injuries sustained in an automobile accident. On April 8, 1983, defendant served an answer and a demand for a verified bill of particulars. Respondent failed to provide a bill of particulars. On August 5, 1983, the defendant moved to preclude plaintiff. On September 12, 1983, a conditional order of preclusion was entered in the Supreme Court, on consent, allowing service of the bill of particulars within 60 days. Served after the lapse of 60 days, the bill of particulars was rejected. Thereafter, respondent's motion, dated March 14, 1984, to extend his time was denied on May 16, 1984 by the Supreme Court, and the defendant's cross-motion for summary judgment was granted. On April 15, 1985 the order of the Supreme Court dismissing respondent's complaint

was affirmed by the Appellate Division, Second Department. Respondent failed to notify his clients of this dismissal until after notification by the Grievance Committee.

Charge IV

On or about September 29, 1978, respondent was retained by Ramon Montana, age 8, in a staircase personal injury case.

On October 13, 1978 respondent served a summons and complaint upon David Gechter, the purported owner of the premises, as reflected in a title report obtained by respondent. No answer was served; respondent failed to enter a default judgment within the statutory prescribed period.

On October 8, 1981 respondent obtained another title report which reflected that the property had been owned by the City of New York at the time of the accident. On May 18, 1982, respon-

dent moved for leave to serve a late notice of claim upon New York City. The Appellate Division, Second Department, reversed the Special Term and as a result the action was dismissed.

Charge V

In June 1981, respondent was retained by Renee Dodge for injuries sustained in a fall on property owned by the New York City Housing Authority. In February 1982, a summons was served upon the Housing Authority. On April 6, 1982, defendant served an answer and a demand for a bill of particulars. Respondent failed to provide a bill of particulars. On June 30, 1982, a 60-day conditional preclusion order was served upon respondent. Respondent failed to comply. On March 22, 1983, summary judgment was granted and the complaint was dismissed. On March 4, 1985, the Appellate Division, Second Department, affirmed the summary judgment.

Charge VI

Respondent was retained by Magaly Zaldua for injuries sustained October 9, 1978 in a bus owned by Metropolitan Suburban Bus Authority. On March 13, 1979 respondent commenced an action. Issue was joined on April 3, 1979. On December 28, 1981, the Supreme Court, Nassau County, granted defendant's motion to dismiss for failure to prosecute and to comply with an order of the court. Respondent failed to oppose the motion to dismiss. On December 3, 1982, a year later, respondent obtained an order conditionally reinstating the matter. On November 28, 1983, the Appellate Division, Second Department, reversed and ordered the action dismissed, citing "... over three years of laxity and neglect on the part of the plaintiff's attorneys."

Charge VII

On August 25, 1982, respondent was retained by Robert Austin, Jr., in a

personal injury automobile accident case. Respondent filed an uninsured motorist claim. An arbitration hearing was then scheduled for November 23, 1983 in the Supreme Court, Queens County. Respondent failed to appear. The hearing proceeded; all issues were resolved against Austin and arbitration of his claim was "forever stayed."

On January 23, 1984, respondent's motion to vacate the above order and judgment was denied without prejudice and with leave to renew upon submission of a transcript of the November 23 proceeding and an affirmation from the attorney setting forth a value excuse for his failure to appear both at the calendar call and the trial part.

Respondent's renewed motion was denied by order dated April 25, 1984, the Court finding the excuse offered for the attorney's non-appearance "grossly inadequate" and an example of "inexcusable law office failure," compounded by the sub-

mission of an unexecuted affirmation. The Appellate Division, Second Department, on April 8, 1985 affirmed the lower court's order.

Charge VIII

In 1981, respondent was retained by Raymond and Simimar Gonzalez to bring an automobile personal injury action. Respondent filed for uninsured motorist arbitration pursuant to his client's insurance policy. The client's insurance carrier obtained a stay of arbitration.

On June 3, 1983, the case appeared on the Supreme Court, New York County calendar on the issue whether the offending vehicle was insured. After several adjournments by respondent, on October 24, 1983, the case was marked "final." On that day, respondent received a continuance to November 23, 1983. Respondent was advised "that a failure to appear and proceed on that date would result in the granting of the carrier's

requested relief." Failing to appear on November 23, a permanent stay of arbitration was granted.

By an order of the Appellate Division, First Department, respondent's default was vacated. The Court noted "with disfavor the deliberate flouting of the Rules of Part XI by (respondent) and would agree that such dilatory conduct is inimical to the orderly administration of a trial calendar...." Respondent was personally ordered to pay $1,000 costs to the other party.

The Answer

Charge I

On January 4, 1979, Irma and Murray Kantor retained respondent's law firm in connection with a motor vehicle accident of December 29, 1978.

Respondent alleges that the Civil Court, Kings County, neglected to include the case on the printed calendar for June 1, 1981. Further, the Civil Court

failed and refused to correct its error despite repeated attempts by associates in respondent's office to compel the Court to correct its error. Ultimately, a motion was made by respondent's firm to compel the Court to assign a trial date to the case.

Charge II

Magdalia Castillo retained respondent's law firm on April 22, 1980. Summonses and complaints were served on October 29, 1981. CPLR 3215(c) is not inflexible regarding the time to take steps for entry of a default. Respondent's firm took appropriate action and "did not abandon the cause of action" as Judge Aaron Bernstein found in his memorandum decision of May 14, 1984.

By notice of motion dated June 20, 1983, defendants Bautista Castillo and Luis Rubio moved for an order pursuant to CPLR 3215(c). Court records document that it was not respondent but Jeffrey

Schwartz, Esq. who was assigned to argue the motion pursuant to CPLR 3215(c). The attorney did not fail to appear but was "simply late." His lateness was excused and the default in answering the motion was vacated by Judge Aaron D. Bernstein in a memorandum decision, dated May 15, 1984.

In a memorandum decision, dated August 6, 1984, Judge Bernstein stated that an affidavit was required from "someone with knowledge that the injuries sustained ... permit ... this action under the no-fault law," namely, a physician, and not from respondent.

A course of action to obtain such a document was obviated by electing to pursue uninsured motorist benefits which provided the client with the same monetary benefits as the action-at-law and resulted in a speedier, more successful adjustment of the client's claim than continuing to pursue the action-at-law would have provided.

Charge III

Ermelindo Lugardo, Marie Vasquez, Carlos Vasquez and Maria Garcia retained respondent's law firm. Respondent served a bill of particulars. The defendant interposed answers dated April 8, 1983 and November 9, 1983, and demands for bills of particulars for each answer. Respondent served a bill of particulars. A motion, dated August 5, 1983, asked for an "order precluding the plaintiffs from offering any evidence at the trial of this action ... or in the alternative, compelling plaintiffs to respond to the demands." An order served on September 22, 1983 provided that plaintiff could serve the bill of particulars until December 1, 1983. The bill of particulars was served on December 14, 1983, approximately 13 days after the 60-day period, due only to an unintentional ministerial breakdown of standard office procedures.

Maria Garcia, Carlos Vasquez and Maria Vasquez disappeared, abandoning their action, and could never be located.

Charge IV

Margarita Sanchez retained respondent for injuries to Ramon Montana, aged eight. A summons and complaint were served on David Gechter, owner of the property, as reflected in title reports.

A motion for a default judgment could not be instituted because the clients could not be located and never made themselves available to provide the required verified complaint or affidavit of merits pursuant to CPLR §3215(e). Ramon Montana has three years remaining to serve a summons and complaint within the period of the statute of limitations.

Respondent admits that he received a title report, dated October 8, 1981, showing the City of New York to be the owner of the property, but denies that

the City of New York owned the property at the time of the accident.

On November 12, 1981, within four weeks of notification that "some entity other than the rightful one" may have owned the property, respondent moved for leave to serve a late notice of claim upon the City of New York by notice of motion returnable November 30, 1981, to protect the infant's rights.

Although respondent admits that the Appellate Division reversed Special Term, he asks that judicial notice be taken of the fact that the City of New York did not own the property at the time of the accident and thus there was no case against the City of New York. The motion to serve a late notice of claim had to be denied as it was not supported by an executed notice of claim pursuant to General Municipal Law 50-e.

Charge V

Respondent's firm was retained by Renee Dodge. Respondent admits that a premature summons and complaint were served on February 24, 1981 "to protect plaintiff's rights in the event that the defendant waived, adjourned, or otherwise frustrated satisfying the condition precedent to suit, namely the statutory hearing." A summons and complaint were thereafter served on July 13, 1982, following the 50-h hearing of June 29, 1982, which commenced a proper, viable action to which defendant never interposed an answer, despite repeated attempts by respondent's firm.

On April 6, 1982, an answer was served, which stated: "... The complaint is a nullity and should be dismissed, pursuant to General Municipal Law 850(i)."

A bill of particulars was served. The matter was assigned to a "trusted, capable member of the bar in good standing, Thomas Markovitz, Esq." who, in

reliance upon defendant's own answer that the complaint served prior to the 50-h hearing was a nullity, judicial authority to the effect that a complaint served prior to a statutory hearing can be dismissed, and agreement with defendant's counsel that defendant would withdraw their motion for summary judgment, exercised his professional judgment as an attorney in regard to service of the bill of particulars.

Charge VI

Respondent alleges that he submitted papers in opposition to defendant's motion to dismiss, resulting in a conditional order for plaintiff Magaly Zaldua's deposition, except that respondent admits that said plaintiff abandoned her action by going to Colombia, South America for seven months without any contact with her attorneys and failed to comply with court orders, resulting in defendant's motion to enter judgment.

The Appellate Division's decision, dated November 28, 1983, dismissed the case due to plaintiff's abandonment of her case. In stated: "... Plaintiff's voluntary departure from the United States for about seven months and her total lack of contact with her attorneys during this period, in which time the judgment against her was entered, do not indicate an intent to actively prosecute her claim. Therefore, plaintiff's motion to vacate the order and judgment dismissing her complaint should have been denied."

Charge VII

Respondent's law firm was retained by Robert Austin. Respondent filed a notice of intention to make claim for uninsured motorist benefits and served a demand for arbitration. Respondent alleges that following a petition to stay arbitration, the matter was set down for a framed-issue hearing on the question

only of insurance coverage of the vehicle in question.

The framed-issue hearing was not assigned to respondent but to Michael O. Palillo, an employee of respondent's firm. Palillo did not fail to appear but appeared late. Following the appeal, a motion upon a signed affirmation of Michael Palillo was not pursued only due to the client's lack of interest "and injuries," thus abandonment of his claim.

A motion was denied without prejudice to renewal and the motion was renewed. The Appellate Division did not ratify any dicta by the lower Court and denied the appeal only because Michael Palillo's reason for his lateness was not validated by his signature on his affirmation. The Appellate Division wrote:

> Appellant failed to offer a valid excuse for his default, as required by CPLR 5025(a)(1). Specifically, the "affirmation" of the attorney assigned to the case was not signed, and was therefore of no force or effect (CPLR 2106).

Charge VIII

Respondent's law firm was retained. "It was the professional legal judgment of respondent's office that if a hearing on the issue of insurance coverage proceeded without the prima facie proof of non-insurance, (the copy of the suspension order on the driver/owner of the offending vehicle from the New York State Department of Motor Vehicles), that issue would have been resolved against the client and a permanent stay of execution would have issued and that therefore adjournment of the framed-issue hearing was mandated."

Documents of record prove that the firm specifically assigned one of its employees, Bruce Marx, and not respondent, to cover the matter on November 21, 1983. Bruce Marx arrived late. The preliminary and permanent stays of execution were vacated. The parties were directed to proceed to arbitration. The

matter is pending before the American Arbitration Association for full resolution of claimant Gonzalez's uninsured motorist claim.

The Appellate Division, First Department, unanimously reversed "on the law" and "on the facts" and "in the exercise of discretion" Judge Stanley Ostrau's error in refusing to excuse Bruce Marx's lateness and the necessity for obtaining the proof of lack of insurance prior to the framed-issue hearing.

First Affirmative Defense
to Charges I-VIII Inclusive

These charges fail to state a violation of the Code of Criminal Responsibility in that facts sufficient to establish that respondent "neglected a legal matter entrusted to him" are not alleged.

Second Affirmative Defense
to Charges I-VIII Inclusive

The claims underlying the charges were never neglected but instead were

continually worked on by respondent's firm, which took numerous necessary steps for the advancement thereof.

Third Affirmative Defense
to Charges II, V, VII and VIII

Respondent's office provided an employee specifically for the assignments in question - Jeffrey Schwartz in Charge II, Thomas Markovitz in Charge I, Michael Palillo in Charge VII, and Bruce Marx in Charge VIII.

The inability of the employee to cover the assignment occurred without respondent's knowledge, consent or authorization and despite direction by respondent's firm. Such error does not constitute a violation of the Code of Professional Responsibility by respondent individually. See In re Wilson, 170 N.Y.S. 725, 729.

Fourth Affirmative Defense
to Charges II, V, VII and VIII

Respondent was not neglectful in assigning the matters to trusted, capable employees of the firm.

Fifth Affirmative Defense
to Charges II, V, VII and VIII

To the extent that respondent is being charged for acts which he did not commit, he is being deprived of due process rights.

Sixth Affirmative Defense
to Charges II, III, V, VII and VIII

Any error on the part of respondent's firm was an unintentional ministerial error or unintentional ministerial breakdown in standard office procedures. They did not constitute a violation of the Code of Professional Responsibility.

Seventh Affirmative Defense
to Charges II, III, V, VII and VIII

Following the unintentional ministerial error, respondent's firm took numerous steps to correct the error on its own initiative.

Eighth Affirmative Defense
to Charges I, II and VIII

The inadvertent ministerial error, by whomever committed, was in fact corrected due to steps taken by respondent's office.

Ninth Affirmative Defense
to Charges II, IV, VI, VII and VIII

The inadvertent ministerial error was rendered moot.

In regard to Charge II (Castillo), an election was made to pursue the uninsured motorist benefits, which excluded recovery through the action-at-law in which a doctor's affidavit is required.

In regard to Charge IV (Montana), no cause of action existed against the City

of New York, thus suing it or moving for a late notice of claim was pointless. Further, taking a default against the defendant Gechter, even if permissible under the Civil Practice Laws and Rules was useless, as the clients were not available to hold an inquest.

In regard to Charge VI (Zaldua), the client had no intent to prosecute her claim actively, and abandoned it.

In regard to Charge VII (Austin), the client had no cause of action, as he had no damages and, in addition, this client determined not to pursue his claim.

In regard to Charge VIII (Gonzalez), respondent won the petition to stay arbitration due to respondent's having obtained the prima facie proof of no insurance and the case is pending before the American Arbitration Association.

Tenth Affirmative Defense
to Charges I and II

The charges fail to state a violation of the Code of Professional Responsibility in that the cases were successfully concluded and settled by respondent's firm.

Eleventh Affirmative Defense
to Charges III and V

When the ministerial error could not be corrected, respondent's firm so advised the clients of that and advised them to obtain independent counsel to determine their rights. The clients did in fact obtain independent counsel and respondent's firm paid a settlement figure negotiated by said independent counsel on behalf of the clients.

Twelfth Affirmative Defense
to Charges III, IV, VI and VII

The clients failed to keep in touch with respondent's firm, could not be located, abandoned their claim, or other-

wise indicated their intent to forego pursuing their claim.

The abandonment by the clients precluded respondent as follows:

(a) Charge III - Maria Vasquez, Carlos Vasquez, and Maria Gonzalez were thus not advised of the outcome of their case.

(b) Charge IV - No default judgment could be obtained against David Gechter, owner of the premises, because such a motion, pursuant to CPLR 2215(a) must be accompanied by a summons and complaint verified by the plaintiff or an affidavit of merits executed by the plaintiff. A motion to serve a late notice of claim would ultimately be denied because General Municipal Law §50-e requires a notice of claim executed by the client in support thereof. Even assuming, arguendo, that a motion was ultimately won for a default or for a late notice of claim, the claim could not be further prosecuted without client participation.

(c) Charge VI - Magaly Zaldua's lack of interest to pursue her case precluded respondent's firm from holding or completing discovery and her departure from the United States for approximately seven months without contact with her attorneys, while depositions were pending precluded her deposition and opposition to defendant's motion to enter judgment.

Charge VII - Robert Austin closed his case due to lack of injuries, thus precluding respondent's firm from moving to renew the motion to vacate the stay of arbitration.

Thirteenth Affirmative Defense
to Charges I, II, IV, V, VI, VII & VIII

Respondent or attorneys associated with him permissibly exercised their professional legal judgment in pursuing one course of action as compared to another in regard to each of the claims.

The exercise of that professional legal judgment was in conformity with DR 7-101(B)(1).

Fourteenth Affirmative
Defense to Charge II

The clients could not recover twice for the same injuries.

An election had to be made between the action-at-law and the uninsured motorist proceeding.

Claimants elected to pursue their uninsured motorist benefits to the exclusion of the action-at-law.

Fifteenth Affirmative
Defense to All Claims

The petition cannot be prosecuted and must be dismissed by reason of petitioner's failure to comply with Appellate Division Rule 691.4(e)(4) and (f) (22 NYCRR 691.4 et seq.) which mandate respondent's right in a probable cause hearing before a Committee or subcommittee prior to the institution of formal

disciplinary proceedings in the Appellate Division.

Sixteenth Affirmative
Defense to All Charges

To the extent that it is alleged that respondent violated D.R. 1-101(A)(5), the charges fail to state a violation of the Code of Professional Responsibility in that facts sufficient to establish that respondent "engaged in conduct prejudicial to the administration of justice" are not alleged.

Seventeenth Affirmative
Defense to All Claims

To the extent that it is alleged that respondent violated D.R. 1-102(A)(6), the charges fail to state a violation of the Code in that facts sufficient to establish that respondent "engaged in any other conduct that adversely reflects on his fitness to practice law" are not alleged.

Eighteenth Affirmative
Defense to All Charges

Section D.R. 1-102(A)(6), as written and applied, is unconstitutionally vague and "multiplitious" and is void for vagueness.

Nineteenth Affirmative
Defense to All Charges

To the extent that it is alleged that respondent violated D.R. 7-101(A)(1) and (2), the charges fail to state a violation of the Code in that facts sufficient to establish that respondent intentionally failed to "seek the lawful objectives of his client ..." and failed "to carry out a contract of employment entered into with a client for professional services ..." are not alleged.

As a Twentieth Affirmative
Defense to Charges III to VIII Inclusive

Charges III through VIII are based on sua sponte investigations independently commenced by petitioner based upon

facts disclosed in published decisions of the Appellate Division, Second and First Departments.

Upon information and belief, petitioner received no direct instructions from the Appellate Division to conduct such "sua sponte" investigations and therefore prosecution on them is unauthorized.

As a Twenty-First
Affirmative Defense to All Charges

The petition violates respondent's due process rights in that the charges are unconstitutionally vague and are void for vagueness.

As a Twenty-Second
Affirmative Defense to All Charges

Respondent is deprived of equal protection of the laws and is being selectively persecuted.

By order to show cause dated June 10, 1988, respondent sought a dismissal of the petition on the ground that

he had been denied a probable cause hearing before the Grievance Committee. By order dated October 7, 1988, the application was denied.

The Proceedings

A pre-trial conference was held on November 18, 1988.

Hearings were held on January 12, March 3, March 20, April 17, June 22, October 24, November 21 and December 8, 1989. On October 24, 1989, Jerome Karp, Esq. was substituted for Nicholas Cooper, Esq., as attorney for respondent.

Synopsis of the Testimony

Petitioner's Case

Re: Charge I-Kantor

PX1 - Office of the Court Administration retainer statement, dated January 4, 1979, for Irma Kantor, bearing the signature of Paul S. Mirman, Esquire (T:46-47).

PX2 - Office of the Court Administration closing statement for Irma Kantor, bearing the signature of Paul Mirman (T:47).

PX3-A - Notice of motion in the Civil Court of the City of New York, County of Kings, in Irma and Murray Kantor vs. Hillary P. Wolf and Jerry Judin.

PX3-B - Affirmation of Paul S. Mirman in support of the motion.

PX3-C - Bill of particulars annexed to the above motion.

PX3-D - Note of issue annexed to the motion.

PX3-E - Affidavit of service by mail (T:48).

PX4 - Copy of the order or decision of the Civil Court by Judge Carmelo J. Tavormina, dated September 4, 1983 in Irma and Murray Kantor vs. Hillary P. Wolf and Jerry Judin, index #3481/80 (T:49-53).

PX5-A - A letter from the Grievance Committee, dated June 16, 1983, to Paul S. Mirman, Esq., 1506 Rockaway Parkway, Brooklyn, re: Complaint of Irma Kantor, Docket #K-327-83 (T:66, 68).

PX5-B - Letter of complaint (T:68).

PX6 - Letter on letterhead of Paul S. Mirman, dated June 29, 1983, addressed to the Grievance Committee, re: complaint of Irma Kantor, and bearing Mr. Mirman's signature (T:68-69).

PX7 - Letter from the Grievance Committee, dated December 14, 1983, to Paul Mirman, Esq. re: complaint of Irma Kantor (T:69-70).

PX8 - Letter of Paul S. Mirman, dated December 30, 1983, to the Grievance Committee re: Irma Kantor, docket #K327/83 (T:70).

PX9 - Transcript of Mr. Mirman's testimony before Counsel to the Grievance Committee - a 29-page document, dated February 19, 1987 (T:70-72).

Re: Charge No. II - Castillo

PX10-A - Office of Court Administration retainer statement, 4/22/80, for Magdalia Castillo, bearing the signature of Paul Mirman.

PX10-B - Affirmation of Mr. Mirman, a nunc pro tunc filing of a late statement with OCA (T:83-84).

PX11 - Office of Court Administration closing statement for Magdalia A. Castillo, dated October 6, 1986, and bearing the signature of Paul Mirman (T:84-85).

PX12-A - Notice of motion in Supreme Court, Kings County, 6/20/83. The motion is made by Tarangello and action is entitled Bautista Castillo, Jr., Daniel Castillo, Milagros Castillo, Carmen Castillo, husband of Magdalia Castillo and Luis Castillo, plaintiffs, vs. Antonio Carlos Torres, Rodriguez Jean, Bautista Castillo and Louis Rubio (T:85).

PX12-B - Supporting affirmations of John W. Kondulis, Esq. (T:85).

PX12-C - Summons and complaint of Paul Mirman in the same entitled action, dated October 2, 1984 (T:86).

PX13 - Order of Hon. Franklin W. Morton, Supreme Court, Kings County, index #14480/83, dated February 28, 1984, in Castillo vs. Torres, et al. (T:86).

PX14 - An affirmation of Paul Mirman with affidavit of mail service in Castillo vs. Torres, et al., #14480, Supreme Court, Kings County (T:87-88).

PX15-A - Notice of Motion by Paul Mirman, bearing index #14480/83, Supreme Court, Kings County, in Matter of Castillo, et al. vs. Torres, et al. (T:88).

PX15-B - A supporting affirmation, 2/6/84, annexed to PX15-A, bearing the signature of Paul Mirman.

PX15-C - An affirmation in opposition of Paul Mirman, bearing his signature in the same action, dated 11/21/83 (T:88-89).

PX16 - An affirmation in opposition of John W. Kondulis, dated 2/9/84, in the Matter of Castillo vs. Torres (T:89).

PX17 - A reply affirmation of Paul S. Mirman in Castillo vs. Torres, dated 2/14/84 (T:89-90).

PX18-A - Supplemental affirmation in Castillo vs. Torres bearing Mr. Mirman's signature, dated 3/6/84 (T:90).

PX18-B - Affidavit of service by mail for above exhibit (T:90).

PX19 - A memorandum decision on 5/15/84 by ADJ Bernstein, Supreme Court, Kings County, Special Term, Part I in Bautista Castillo, et al. vs. Antonio Carlos Torres, et al. (T:91).[1]

PX21-A - Notice of motion, dated 6/15/84, in Castillo, et al. vs. Torres, et al., index #14480/83, Supreme Court, Kings County, Paul S. Mirman, attorney for movant.

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[1] There is no PX20, since PX13 and 20 were the same exhibits (T:91).

PX21-B - Affirmation in support of the above motion, 6/15/84, and signed by Jeffrey H. Schwartz.

PX21-C - Affidavit of merits therein, signed by Milagros Castillo.

PX21-D - Affidavit of service, 6/22/84 (T:92).

PX22 - Affirmation in opposition by John W. Kondulis in Bautista Castillo, et al. vs. Carlos Torres, et al. (T:92-93).

PX23-A - Reply affirmation in Bautista Castillo vs. Torres, signed by Jeffrey H. Schwartz on July 2, 1984.

PX23-B - Affidavit of merits, signed on 7/5/84 by Magdalia Castillo, notarized by Thomas P. Markovitz.

PX23-C - Affidavit of service by mail, 7/5/84, signed by Lisa Kelly and notarized by Michele Turchin (T:93-94).

PX24-A - Order of Judge Aaron D. Bernstein, 7/11/84, in Castillo vs. Torres, index #14480/83.

PX24-B - Affirmation of lateness on the above action, signed by Jeffrey H. Schwartz, 6/20/84.

PX24-C - Affidavit of service by mail, 6/20/84, signed by Lisa Kelly and notarized by Jeffrey H. Schwartz (T:94).

PX25 - Memorandum by Judge Bernstein, 8/5/84, in Bautista Castillo vs. Antonio Carlos Torres.

PX26 - Order of Judge Aaron D. Bernstein, 10/2/84, in Castillo vs. Torres (T:95).

PX27-A - Notice of appeal, 10/19/84, by Paul S. Mirman, P.C., attorney for plaintiff in Castillo vs. Torres.

PX27-B - Civil appeal, 10/17/84, pre-argument statement for the Appellate Division, Second Department.

PX27-C - Affidavit of service by mail, 10/17/84, bearing signature of Audrey Chasen and notarized by Jeffrey H. Schwartz (T:95-96, 98).

PX28-A - Notice of motion in Castillo vs. Torres, 11/13/84.

PX28-B - an affirmation in support of the motion, bearing signature of Michele Turchin (T:98-101).

PX28-C - Affidavit of service by mail, 11/13/84, bearing signature of Lisa Kelly and notarized by Jeffrey H. Schwartz (T:101).

PX29 - Fifty-seven pages of testimony of Mr. Mirman before counsel to the Committee on 3/6/87 (T:101-02).

Charge III - Lugardo

PX30 - OCA retainer statement for Ermelindo Lugardo, 11/30/82 by Paul S. Mirman, Esq.

PX30-A - the OCA stamp upon receipt of the retainer statement (T:102-103).

PX31 - OCA retainer statement for Marie Garcia, 11/30/82, designating Paul S. Mirman as attorney.

PX31-A - The stamp of OCA designating receipt of the retainer statement (T:103).

PX32-A[2] - A demand for a verified bill of particulars, dated 4/8/84, in Ermelindo Lugardo, et al. vs. Neville Folkes in Supreme Court, Kings County.

PX32-B - A "combined demand" in the above action, 4/8/83 (T:104).

PX33 - Verified answer and counter-claim in Ermelindo, et al. vs. Neville Folkes, dated 4/8/83, in Supreme Court, Kings County, from the law firm of Rivkin, Leff, Sherman and Nadler (T:104-06).

PX34 - A pre-calendar hearing request in Special Term, Part VIII, index #4481/83, bearing the name of Paul S. Mirman and indicating issues joined 4/8/83 (T:106).

PX35 - Copy of letter, 6/7/83, from Robert J. Availlone of Rivkin, Leff, Sherman and Nadler, addressed to Paul S. Mirman, Esq. re: the Folkes case.

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[2] There is no PX32 (T:103-04).

PX36-A - Notice of motion to preclude in Ermelindo Lugardo, et al. vs. Neville Folkes, 8/5/83, submitted by Rivkin, Leff, Sherman and Nadler, attorneys for defendant.

PX36-B - An affirmation in the same matter, 8/5/83, from Craig J. Bruno.

PX36-C - Affidavit of service, 8/5/83 (T:107).

PX37-A - Order of Supreme Court, Kings County, Special Term, Part I, by Hon. Frank Vaccaro in Ermelindo Lugardo, et al. vs. Neville Folkes, 9/12/83.

PX37-B - Notice of entry, 9/27/83, from firm of Rivkin, Leff, Sherman and Nadler (T:108).

PX38-A - Verified answer and counterclaim, 11/9/83, in Ermelindo Lugardo, et al. vs. Neville Folkes, Supreme Court, Kings County.

PX38-B - Demand for verified bill of particulars in above proceeding, 7/8/83.

PX38-C - Combined demand, 4/8/83, in above-entitled case.

PX38-D - Notice of examination before trial, 4/8/83.

PX38-E - Affirmation of Craig J. Bruno, 11/9/83 (T:108-09).

PX39 - Bill of Particulars in Ermelindo Lugardo, et al. vs. Neville Folkes, Supreme Court, Kings County, 12/14/83, from Paul S. Mirman, P.C., attorney for plaintiffs.

PX40 - Copy of a letter, 12/21/83, from Craig J. Bruno of Rivkin, Leff, Sherman and Nadler, to Paul S. Mirman, 11/21/83, re: Lugargo, et al. v. Folkes (T:111-12).

PX41-A - Notice of motion, 3/14/84, by Paul S. Mirman, P.C., attorney for plaintiffs, in Ermelindo Lugardo, et al. vs. ~~Neville~~ Folkes, Supreme Court, Kings County, index #18528/83.

PX41-B - Affirmation therein by Paul S. Mirman, 3/14/84 (T:112-13).

PX42-A - Notice of motion in Ermelindo Lugardo vs. Neville Folkes,

Supreme Court, Kings County, by Paul S. Mirman, P.C., 4/11/84.

PX42-B - An affirmation dated 4/10/84 of Jeffrey Schwartz of firm of Paul S. Mirman in Lugardo, et al. vs. Neville Folkes, Supreme Court, Kings County.

PX43-A - An order of Supreme Court, Kings County, 5/16/84, by Judge Leonard Scholnick in Ermelindo Lugardo et al. vs. Neville Folkes.

PX43-B - Notice of settlement, 4/13/84, from Rivkin, Leff, Sherman and Nadler, attorneys for defendant.

PX43-C - Affidavit of service, 4/13/84 (T:113-14).

PX44 - Document of Judge Leonard Scholnick, Supreme Court, Special Term, Part One, 6/17/84, in Ermelindo Lugardo, et al. vs. Neville Folkes, index #18528/83.

PX45-A - Order on appeal from orders rendered by Appellate Division, Second

Department, 4/15/85 in Ermelindo Lugardo, et al. vs. Neville Folkes.

PX45-B - Decision of Appellate Division, Second Department, 4/15/84 in the above matter (T:114-15).

PX46 - A letter, 8/27/85, from Robert J. Salzman, Grievance Committee, to Paul S. Mirman, re: sua sponte investigations, K-495 of 1985 and K-621 of 1985 (T:115-16).

PX47 - A letter, 9/23/85, of Paul S. Mirman to Grievance Committee re: Ermelindo Lugardo (T:116-17).

PX48 - A letter, 1/23/86, from Paul S. Mirman to Ermelindo Lugardo (T:177).

PX49 - Mr. Mirman's testimony before counsel to Grievance Committee, 6/11/87, pp. 507-533 re: Lugardo (T:117).

Charge IV - Montana

PX50 - OCA retainer statement, 11/30/78 for Raymond Montana, an infant, signed by Paul S. Mirman, Esq.

PX51 - A summons and complaint, 10/13/78, in Supreme Court, Kings County, from Paul S. Mirman re: Raymond Montana vs. David Gechter (T:119-120).

PX52A - A motion by Paul S. Mirman, attorney for the plaintiff, in Raymond Montana, et al. vs. City of New York, index #26585/81 in the Supreme Court, Kings County, for an order permitting the infant plaintiff to serve a late notice of claim on the City of New York.

PX52-B - An affirmation in the above case, signed by Paul S. Mirman (T:120).

PX53-A - An opinion and order of Hon. Francis X. Agitto, Supreme Court, Kings County, in Raymond Montana, et al. vs. City of New York, dated August 5, 1982.

PX53-B - An affidavit of service, dated August 18, 1982 (T:120-21).

PX54-A - An order, dated September 16, 1983, by the Appellate Division, Second Department on appeal from an order

in Raymond Montana, et al. vs. City of New York.

PX54-B - Decision of the Appellate Division, Second Department, 6/13/83 in the above matter.

PX55 - Testimony of Paul S. Mirman, April 24, 1987, before the Grievance Committee counsel (pp. 371-392) (T:122-123).

Charge V - Dodge

PX56 - Office of Court Administration retainer statement, 6/8/81 for Renee Dodge, signed by Paul Mirman, Esq. (T:123, 125).

PX57 - A summons and complaint, in the Supreme Court, Kings County, dated February 19, 1982 - in Renee Dodge vs. New York City Housing Authority. The summons and complaint are from the office of Paul Mirman and are dated February 19, 1982 (T:125-26).

PX58 - An answer to the complaint in Renee Dodge vs. New York City Housing

Authority, dated April 6, 1982, by Gladstein and Isaac, attorneys for defendant (T:126-27).

PX59-A - A demand for a bill of particulars in the above action, dated April 6, 1982, from Gladstein and Isaac.

PX59-B - Notice for discovery and production in the above action of reports of physicians and others and authorizations dated April 6, 1982 - from Gladstein and Isaac to Paul S. Mirman, Esq.

PX59-C - Combined demand for party statements, witnesses' names and addresses and photographs in the above action (T:127-28).

PX60 - An order, dated 7/30/82, of Judge Gerald Adler, Supreme Court, Kings County, in Renee Dodge vs. New York City Housing Authority, index #11139/82 (T:128).

PX60-A - Affidavit of service (T:207).

PX61-A - An order, dated 3/22/83, of Judge Franklin N. Morton in Renee Dodge vs. New York City Housing Authority, index #11139/82.

PX61-B - Affidavit of service by mail by Linda A. Ogelein.

PX-61C - The judgment entered on May 20, 1983 in Renee Dodge v. New York City Housing Authority (T:129-30).

PX62-A - An order of the Appellate Division, Second Department, 3/4/85, in Renee Dodge, appellant vs. New York City Housing Authority (T:130-33).

PX62-B - The opinion of the Appellate Division in the above matter (T:130-33).

PX63 - A letter on the letterhead of Paul S. Mirman, P.C., 9/23/85, bearing the signature of Paul S. Mirman (T:134).

PX64 - Copy of a letter on the letterhead of Paul S. Mirman, P.C., 8/7/85, addressed to Miss Renee Dodge, 157 Belmont Avenue, Brooklyn (T:134).

PX65 - Plaintiff-appellant's brief submitted by Paul S. Mirman, P.C. to the Appellate Division re: the above case (T:134-35).

PX66 - The brief of the defendant-respondent in the above case (T:135-39).

PX67 - Respondent's sworn testimony before counsel to the Committee, 4/27/87, pp. 448-479 (T:139).

Charge VI - Zaldua

PX68 - OCA retainer statement, 10/30/78, for Magaly Zaldua, bearing the signature of Paul S. Mirman, Esq. (T:139-40).

PX69 - The summons, dated 2/23/79, in Magaly Zaldua vs. Metropolitan Suburban Bus Authority from the law office of Paul S. Mirman, Esq. It was received by MSBA Claims Department on 3/13/79 (T:140).

PX70 - Answer in Zaldua vs. Metropolitan Suburban Bus Authority, filed by Curtis, Hart & Zalukiewicz (T:140).

PX71-A - Request for a pre-calendar hearing in the Zaldua case, index #5471/79.

PX71-B - An affidavit of service therein, 3/22/81 (T:141).

PX72-A - An order of the Supreme Court, Special Term, Part I, Nassau County, Hon. George A. Murphy, 9/4/79, in the Zaldua matter.

PX72-B - The notice of entry therein. This was received subject to petitioner supplying an affidavit of service (T:141-44).

PX73-A - A short form order of Hon. Paul J. Widlitz, Special Term I-A, Supreme Court, Nassau County in Magaly Zaldua vs. Metropolitan Suburban Bus Authority, dated 4/15/81. Petitioner will attempt to obtain the affidavit of service. This order, dated 5/11/81, bears the Clerk's notation: "The plaintiff, having been called in open court and having failed to appear, her default is hereby noted..." (T:145-46; 152).

PX73-B - A letter of 4/16/87, addressed to Paul S. Mirman, 1406 Rockaway Parkway, Brooklyn, on letterhead of Curtis, Hart and Zalukiewicz, signed by Paul S. Deine (T:146, 152).

PX74 - An order, dated 8/24/81, of the Supreme Court, Special Term Part I, Nassau County, index #5471/79 in Magaly Zaldua vs. Metropolitan Suburban Bus Authority (T:146-47, 152).

PX75 - A statement by defendant's lawyer, Bruce Scher, on the record in Supreme Court, County of Nassau in Magaly Zaldua vs. Metropolitan Suburban Bus Authority re: "Mr. Mirman's failure to appear" (T:152-54).

PX76-A - Notice of motion, dated 7/13/81, in Supreme Court, Nassau County, in Magaly Zaldua vs. Metropolitan Suburban Bus Authority, index #5471/79. The moving party is Curtis, Hart and Zalukiewicz and is addressed to Paul S. Mirman.

PX76-B - Affidavit in support of the motion.

PX76-C - Affidavit of service of the motion, 7/13/81, signed by Patricia Glan (T:154-55).

PX77 - Affirmation in opposition by Mr. Mirman in Magaly Zaldua vs. Metropolitan Suburban Bus Authority. Attached is an affidavit of service by mail on Custis, Hart and Zalukiewicz by Mr. Mirman's office (T:155-56).

PX78 - Order of Supreme Court, Nassau County, in Zaldua vs. Metropolitan Suburban Bus Authority, index #5471/79, Special Term, Part I, dated November 10, 1981 (T:156).

PX79-A - Judgment, Supreme Court, Nassau County in Magaly Zaldua vs. Metropolitan Suburban Bus Authority, index #5471/78, and is signed by Harold W. McConnell on 12/28/81.

PX79-B - Affidavit of service by Edith N. Byrne, 12/17/81 (T:156-57).

PX80-A - Motion dated 8/25/82 by Paul S. Mirman, P.C., to Curtis, Hart and Zalukiewicz to set aside the judgment in Supreme Court, Nassau County, in Magaly Zaldua vs. Metropolitan Suburban Bus Authority, index #5471/78.

PX80-B - Affirmation of Paul Mirman dated 8/27/82 (T:157-61; 206).

PX81 - Brief of Paul S. Mirman in Magaly Zaldua vs. Metropolitan Suburban Bus Authority, bearing Appellate Division stamp of 8/10/83 (T:161).

PX82 - Order and decision of Appellate Division, Second Department, 11/28/88, in Magaly Zaldua vs. Metropolitan Suburban Bus Authority. The decision attached to the order is xeroxed from 97 A.D.2d 842 (T:162-63).

PX83 - A letter on letterhead from Paul S. Mirman, P.C. and Associates, 9/18/86, signed by Paul S. Mirman, addressed to State of New York Grievance Committee re: Sua Sponte Complaint No.

K634-85, Zaldua vs. Metropolitan Suburban Bus Authority (T:163-64).

PX84 - Copy of Mr. Mirman's sworn testimony before Counsel to the Committee, 4/24/87, pp. 479-501 (T:164-66).

Charge VII - Austin

PX85 - OCA retainer statement of Robert Austin, 8/31/82 (T:166).

PX86 - Record on appeal in Appellate Division, Second Department, by Paul S. Mirman in Matter of Application of American Security Insurance Company, petitioner-respondent vs. Robert Austin, respondent-appellant, and Criterion Insurance Company and Edger Shumate, respondents (T:166-68).

PX87-A - An order dated 4/8/85 on appeal from an order, in the Appellate Division, Second Department, in re: American Security Insurance Company vs. Robert Austin, et al.

PX87-B - Decision of Appellate Division, Second Department, 4/8/85 in above proceeding (T:168).

PX88 - A letter, 9/25/85, addressed to the Grievance Committee from Paul S. Mirman re: American Security Insurance Company vs. Robert Austin (T:169).

PX88-A - Brief attached to previous letter (T:169-70).

PX89 - OCA closing statement for Robert Austin, signed by Paul Mirman (T:169).

PX90 - Mr. Mirman's testimony before Grievance Committee counsel on 6/11/87, pp. 553-577 (T:171).

Charge VIII - Gonzalez

PX91 - Retainer statement for OCA of Raymond Gonzalez, 5/27/81, signed by Paul S. Mirman, Esq. (T:171).

PX92 - Record on appeal in Matter of Application of Nationwide Insurance Company vs. Raymond Gonzalez, et al., sub-

mitted by Paul S. Mirman to Appellate Division, First Department (T:172).

PX93-A - Order of Appellate Division, First Department, 2/14/85, in Nationwide Insurance Company vs. Raymond Gonzalez, et al.

PX93-B - Opinion of Appellate Division, First Department, re: order in 93-A (T:172-73).

PX94 - Letter of 3/31/88 to Grievance Committee from Paul S. Mirman concerning sua sponte complaint of Raymond Gonzalez, docket #K319/88 (T:P173).

Respondent's Case

Michele Turchin, a senior attorney in respondent's law office, testified (T:217-18). The firm's intake in 1981-82 was about 1,000 cases annually; this year it will probably shrink to 500-600 by limiting the intake to more substantial cases (T:223).

Her firm supervises the progress of cases in the following manner: selected

attorneys review the files, systematically from A to Z, at least three times a year. "When we finish with the Z, we start from the beginning" (T:227, 246).

When respondent first started, a review sheet or a work sheet was used and it incorporated "basic questions," and the more experienced attorneys, like respondent and herself, looked over the review sheets. The sheet had to be filled in when a summons and complaint or a bill of particulars were prepared.

Since at least 1983-84, respondent has had a "to do" or a "check list" - boxes are checked off for the work performed by attorneys or the work they want performed (T:228-29).

RX A-1 - A card for Calendar Watching Service which supervises their cases in Manhattan. RX A-2 - A calendar request for Futterman's Court Service. RX A-3 - a form letter respondent uses for Susan Sohmer for his calendar service in Civil Court, Kings County (T:232).

RX B - A work sheet used by respondent's attorneys to check off on the "do" column, the work they want done (T:238-41). It will specify when the work was ordered, the court and judge, index number, and calendar number. When the secretaries do the work specified, they check it off, and if it hasn't been done, a big red circle will so indicate.

RX C - The pending file check list, essentially a review sheet. This is a recent innovation - 1984 or 1985 - not in effect when she first came to the firm (T:239, 241).

A motion book is kept as well as a book for physical examinations and a book for court appearances and court dates (T:245).[3]

Kantor Case - Charge I

She worked on the Kantor case (T:251-51). Mrs. Kantor was the driver

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[3] More recently, respondent has introduced a computer system (T:245).

of a car which was cut off, and she suffered a cervical sprain and strains. Emergency room treatment was given. No lengthy hospitalization, no fractures, no scarring resulted. The case was settled in March or April, 1984 for $5,000.00 personal injury and $1,365 property damages (T:304).

Commenced in the Supreme Court, it wound up in the Civil Court under CPLR §325-D providing that a judge, believing that a case does not belong in the Supreme Court, may exercise his discretion to remit it to a court of limited jurisdiction, while retaining the same ad damnum clause (T:252-53). But there is nothing in the file that reflects the fact that the case had been transferred to the Civil Court (T:360).

In January 1981, the Kantor case appeared on the trial calendar in Civil Court and was adjourned to June 1. But the court calendar does not reflect that the case appeared on the latter date.

Nor was it marked off or dismissed. On June 29, 1983 she made a motion to correct ministerial error of the Civil Court for failing to carry this case forward on its trial calendar. The case was restored to the calendar and given a new trial date.

Four months later, it was settled (T:253, 258, 263-64).

Susan Sohmer was the calendar service used by the firm to check the calendar status in all Civil Court cases. Sohmer picks up the new cases appearing on Civil Court calendars for any one date. If respondent's firm is not in court, Sohmer will pick up adjourned dates and advise respondent.

Sohmer serves three purposes: (1) she picks up the dates in the first instance; (2) advises of adjourned dates; and (3) checks calendar status, to find out "what the story is with a case on the calendar" (T:264-65). Sohmer was used in this case, as in every Civil Court case

of respondent (T:267). When a case comes up for the first time in Civil Court, Susan Sohmer would advise her office, as well as on subsequent dates.

In Civil Court, Kings County, it is not unusual for a case to be on the calendar for one year. "It would be unusual to be on the calendar for two years unless it was a [§205] D [a case transferred from the Supreme Court to the Civil Court] and you couldn't know when it was come down to the Civil Court" (T:269).

She [Ms. Turchin] believes that her office was aware of the problem with the Kantor case before notification received from the Grievance Committee. Mrs. Kantor had been in respondent's office in April 1981 and executed an examination before trial - two months before the case was supposed to come up for trial. In late May 1983, Mrs. Kantor wrote a letter to respondent; she was somewhat upset, and after that she complained to the

Grievance Committee. Respondent's office went to the Court, pulled out the calendar card and spoke to court personnel. Respondent's motion to restore the case was made after the Bar Association had notified respondent. The Bar Association's complaint to respondent is dated June 16, 1983 and respondent's motion is dated June 29, 1983, after Kantor's complaint had been forwarded to respondent (T:268-71, 275, 303; PX5-A, 15-B). Respondent's motion was granted on August 4, 1983 (T:275-76).

Respondent was unable to obtain a copy of the 1968 court card despite a request (T:277).

The Kantor jacket is not the original jacket which became dog-eared. The new jacket is dated 2-13-84. At that time, the dates when a case would appear on the trial calendar and adjourned dates did not appear on their file jackets. What they did know by looking at the file was that on June 17, 1980, the case had

been placed on the Supreme Court calendar. But they couldn't "necessarily" know from the cover on the file itself that the case was a §325(d) CPLR case or when it had been sent down from the Supreme Court to the Civil Court. "From the jacket itself you couldn't tell the dates" (T:284, 309). By looking at the time there was no way of telling that the case had been on the Civil Court calendar for such a long period of time without any trial date. "You would look at it and say it would be coming up and that would be the end of it" (T:284). The file had the calendar receipt, the note of issue in the Supreme Court but not the calendar dates. Although the office diary recorded that the case had been transferred from the Supreme Court to the Civil Court, "but a copy of the diary didn't stay in the file" (T:359). The diary contained the various dates of adjournment (T:350).

None of the dates when the case appeared in the Civil Court - January 28, March 7 and finally June 1 - is reflected on the file though they did appear in the office diary (T:1347, 1349-50). The files contain the medical records, pleadings, orders "but as far as court dates, we have not in the past kept those" (T:1371). "Nobody looked at it" (T:1353). There is no entry in the diary that the case did not appear on the court calendar on June 1 (T:1355). No proof could be presented "from this file that remains here" that calendar service was asked to check why the case did not appear on the June 1 calendar (T:1358).

If Mr. Levine of respondent's office, assigned to the Kantor case, had checked why the case did not appear on the June 1 calendar, he would have found that the case wasn't on the calendar for that day and it would have been instantly restored (T:1354).

RX "D" - A xeroxed copy of the front and back of the Civil Court calendar card prepared when the Court granted respondent's motion to correct the error with a direction to the calendar clerk to supply a new trial date (T:277-78).

The following testimony was elicited regarding respondent's file reviewing procedure:

> Q.: Is there anything in your office's procedure at the time that would have ever brought this problem to your attention if it hadn't been for Mrs. Kantor's call?
>
> A.: Ultimately, file review, somebody bringing it to another person's attention. That's what.
>
> (T:721)

PX9 - Excerpts From Respondent's Testimony Before Grievance Committee Counsel - 2/17/87

Re: Irma Kantor (Charge I)

> A.: ... I am testifying only as to my recollection, as it allows me to. We had discussed this with the Administrative Judge when

we found the error and we pointed it out, and he agreed with us but the clerk was afraid, and the Administrative Judge -

Q.: Which Administrative Judge?

A.: I think it was Judge Greenstein but I am not sure...

(T:56-57).

Q.: Did it go to the Civil Court in 1981?

A.: It was sent down to Civil Court. I don't know at what point they sent it down and then it came up for trial. In referring to the fourth paragraph of the letter of June 29,[4] it says the case reached the day calendar in Civil Court, was conferenced and offer of $2,000 settlement was made, which was rejected, and the matter adjourned.

The case appeared on the calendar on March 9, 1981, so I imagine that it appeared on the calendar once before that.

---

[4] June 29, 1983.

I don't know the date. Based on this letter, that is the only information that I could testify to. I have no idea what date it was but I assume it was prior to March 9, 1981.

(T?58).

* * *

Q.: When did you send the letter to the Calendar [Watch] service?

A.: It would be sent out every time a file is reviewed, every time a file is reviewed that is on the calendar.

I make it a habit to send it out.

Q.: How often was this file reviewed?

A.: We do files every few months depending on the year and whatnot. At that particular time it could have been every three months.

Q.: Would your recollection be that this file was reviewed sometime in 1981?

A.: It was reviewed sometime probably in 1981.

* * *

> No, I don't have a recollection as to that specific case. I only have a recollection as to my office procedure.

(T:65-66).

> Q.: The motion to restore it to the calendar, was that made an ex parte motion to the court or was that served on the adversary?
>
> A.: The judge told me to make it ex parte. However, I am not sure, but my recollection is that it was made ex parte.

(T:70)

Castillo Case - Charge II

In the Castillo case, respondent represented passengers in a two-car collision who suffered contusions, sprains and strains. The medical bills were in the $100, $150, maybe $200 range (T:314). The complainants were in a car insured by Geico. Geico thus had any uninsured motorist coverage. "It had the no-fault

coverage and it also was the third-party car." On May 21, 1980, respondent served a notice of intention to make claim on Geico, RX E (T:320-21). The notice of intention is filed as otherwise the client runs the risk of losing the right to pursue a case against an uninsured motorist (T:322).

A lawsuit was commenced on October 28 or 29, 1981. No answer was interposed (T:315). Respondent wrote to Geico. Instead of answering, defendant made a motion pursuant to §3215 to dismiss the complaint by reason of respondent's failure to take a default judgment. The motion, dated November 27, 1985 and returnable December 13, 1985, was granted, no appearance by respondent. Respondent's office failed to appear (T:318, 323). Respondent's associate had arrived late for the Calendar Call. Within two weeks - on February 6, 1984 - respondent moved to vacate the default, PX15 (T:317, 319, 324-29). On Febru-

ary 6, 1984, Judge Bernstein granted the defendant's motion to dismiss but "without prejudice to an application by the plaintiff [respondent] to renew this motion on submitting an affidavit of merit." The judge already had before him the doctor's reports (T:338). Respondent then obtained an affidavit of merit from two of his clients. The defendant opposed the motion, claiming that respondent had to submit an affidavit from each and every passenger. Respondent then obtained an affidavit from another passenger. Judge Bernstein ruled that "it wasn't a question of one or a hundred plaintiffs. We needed a doctor's affidavit to support the application" (T:339). Petitioner and the referee pointed out that Judge Bernstein's order makes no reference to a doctor (T:340). The judge's order reads as follows:

> Motion denied on the grounds that the plaintiff has not submitted a sufficient affidavit of merits for all the plaintiffs. In order to have

> the affidavit of merits, the affidavit must be made by someone having knowledge that the injuries sustained by the individual plaintiffs permit the plaintiffs to bring this action under no fault law.
>
> (T:929).

Respondent was unable to obtain an affidavit from Dr. Rivero, who stated he had not seen the patients for a very long period and the injuries were "not that serious" (T:352).

The doctor's report of October 27, 1980, regarding Luis Castillo, indicated there had been no fractures, no scarrings. "The cervical spine elicited pain and was associated with difficulty in motion. There was a restriction of motion and the lumbosacral spine elicited pain on motion and was restricted upon extension" (T:366). Castillo had a limited range of motion in the right knee, which was painful. He wore a brace on the left knee. Heat therapy and medications were prescribed. He saw the doctor

on April 22, 1980, in May and June, twice in August, twice in September, the last visit was on September 20. He had had an emergency room visit at Greenpoint Woodhull Hospital and a lumbar corset and hinge knee brace from Flatbush Surgical Supply, which billed him $220.35. No x-rays were taken.

Magdalia Castillo's medical bills by Dr. Rivero were $51.57 and $64.30 (T:367). The emergency room record indicates no scarring, no fracture. X-rays were taken of "something." Her emergency room bill, conservatively speaking, would have been $100, $125 (T:368). She saw the doctor in April, May and June about 4-5 times a month; twice in July, twice in August and twice in September. Her last visit was on October 8, 1980. She had headaches, cervical spine sprain, lumbosacral spine sprain, sprain of right hip, and a hematoma of the right hip. She had a bill from Flatbush Surgical

Supply for $148.40 for a cervical collar, and a lumbar spinal corset (T:369).

Carmen Castillo's bills from Dr. Rivero were $121.77 and $69.30. She was treated twice in April, five times in May, four times in June, four times in July, twice in August and twice in October. There was also an emergency room visit at Greenpoint Woodhull Hospital. The diagnosis appears to be contusion of the left knee. She also consulted with Dr. Albert Hornblas, an ophthalmologist and plastic surgeon. She had a visual acuity of 20/40 in the "right" eye and 20/80 in the "right" eye. The doctor could not ascertain why she had very poor vision (T:369-70). She also had pain and limitation of motion to 10 degrees in the cervical spine, painful left shoulder with limitation of motion, and pain in the lumbosacral spine, as well as a hematoma over the left knee. The diagnosis also cited headaches, cervical spine

sprain, lumbosacral spine sprain and contusion of the left knee.

Bautista Castillo, Jr., 17, also saw Dr. Rivero. His bill was for $101.97. He saw Dr. Rivero on April 22 and approximately four follow-up visits in May 1980, three in June, once in July and on October 15. He went to the Greenpoint Woodhull Hospital emergency room. He sustained no fractures, no scarring, no "dismembership." He had a lower back injury, and was given Tylenol. Flatbush Surgical Supply billed him $210 for a lumbar shingle and a lumber spinal corset (T:371-72).

Respondent at this point decided to forget the action-at-law and proceed with an uninsured motorist proceeding because one of the cars was uninsured. Geico insured the car in which the respondent's passengers were riding. Geico thus had the uninsured motorist coverage (T:319-20, 354).

RX F1 - Respondent's demand for arbitration, served by registered mail, return receipt requested.

RX F2 - Return receipt thereon (T:358).

Geico moved to stay arbitration. It was set down for a framed issue hearing on the question of coverage. Geico then settled the matter in an uninsured motorist proceeding (T:359).

The following colloquy ensued:

Mr. Cooper:

Q.: In your opinion, was the client prejudiced at all by the fact that this action was ultimately pursued and settled through the uninsured motorist claim?

A.: No.

Q.: Why not?

A.: Under the law of the Second Department, Appellate Division the clients could not recover twice through uninsured motorist and through an action at law. That's a case called Snyder v. Nationwide and

> others. In addition, the policy limits were the same in the action at law and in the uninsured motorist, so the amount of money that they had to tap was exactly the same, and finally, they could in this case only recover due to the nature of their injuries through uninsured motorist proceedings, and the action-at-law ultimately would have resulted in a dismissal either by a defendant under Licari, the Court of Appeals case, which defined what a serious injury was, or at trial by a jury verdict.

(T:380-81)

The case was settled.

RX G1, G2, G3, G4 - Geico checks for $1,000, $2,000, and $2,000 (T:360-61).[5]

PX29 - Respondent's Testimony Before Grievance Committee Counsel

Re: Castillo - Charge II

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[5] Decision was reserved with respect to respondent's offer of RX A-2 for identification, an internal memorandum in the law office of Salvatore A. Manzoni (T:1036). I have decided to have it marked RX A-2 in evidence. It does not in any way impinge on my decision.

He was retained on April 22, 1980 for an accident on April 20 (T:2). He represented members of the Castillo family, all car passengers (listing their names) (T:4-5). If clients ask him for the name of a physician who treats no-fault cases, his office supplied the names of doctors (T:12). He never received an answer to the summons which had been served on October 29, 1981. On June 8, 1983, he wrote to Geico to interpose an answer (the letter is reproduced at T:47) (T:13-14, 21, 24). On June 29, 1983, Geico moved to dismiss because respondent didn't take an inquest (T:19). Respondent failed to appear in opposition because his assistant had been delayed in traffic and the motion was granted. Within two weeks, respondent made an application to vacate the default. It was granted. The Court continued:

> The Court will now address the motion to dismiss for failure to enter a default judgment within one year after the default. Section 3215(c) is

based on the presumption that the plaintiff has abandoned the cause of action by his inaction after a year from the date of the default of the defendant. In this case, however, it appears that the plaintiff's counsel did not abandon the cause of action. Before an application was brought by the defendant, plaintiff's counsel wrote to the defendant's insurance company or carrier requesting that they appear on behalf of the defendant. In fact it would appear that this very motion to dismiss the complaint was stimulated as a result of plaintiff counsel's letter. It seems to be an unjust result to dismiss the plaintiff's complaint while the plaintiff's counsel was doing his best to avoid a default judgment against the defendant and his insurance carrier. The Court is inclined to deny the motion to dismiss the complaint. However, plaintiff has failed to submit an affidavit of merit. This is a basic requirement which cannot be overlooked. Accordingly, the defendant's motion is granted without prejudice to an application by the plaintiff to renew this motion upon submitting an affidavit of merit. (T:25-6)

In compliance with Judge Bernstein's order of October 29, 1983 (T:25), he submitted an affidavit of merits from one complainant (T:35).

> Q.: Mr. Mirman, would it ever be necessary to submit an affidavit of merit for your other clients as well?
>
> A.: From a doctor, yes.
>
> (T:36).

He demanded arbitration. "This gave me a perfect out and that's what I did and I got paid." The case was settled on September 29, 1986 with Geico. When the judge wanted an affidavit from a doctor to the effect that there was a permanent injury and he could not obtain it, he decided it was better to go to "UM" (uninsured motorist), where the criteria for a suit are much less (T:53-54). He had filed an appeal with the Appellate Division (from Judge Bernstein's order) but it was not pursued (T:55).

The settlement proceeds follow.

Magdalia Castillo	$2,340.00
Luis Castillo	$1,091.00
Carmen Castillo	$1,091.00
Bautista Castillo, Jr.	$1,091.00

(T:57)

Charge III (Lugardo)

Lugardo was the driver of a vehicle involved in a car accident. There was a stop sign against him. He suffered a fractured nose. Passengers in his car were two Marias, a child Carlos and two women, Maria Vasquez and Maria Garcia. An initial summons and complaint, dated January 10, 1983, was served on February 21, 1983. When summonses and complaints are prepared they are sent to the client with a cover letter to review the document, verify and return it (T:382). The fact that a summons and complaint are in the file indicates that that was the procedure in this case. The form letter sent to the client is not kept in the file. Their letter asked the client

after verifying the summons and complaint to return them to the office (T:383).

RX L is the original file jacket in this case (T:384, 388). The date - 11/30/82 - on the jacket is the date a secretary opened up the file. MVAIC refers to the fact that the secretary sent away for the police report, hospital records, doctors' reports, filed the uninsured motorist notice and notice of intention to make claim. The secretary would then file a client's motor vehicle accident report, send away for the defendant's accident report and defendant's insurance information. Appearing underneath, "D" stands for defendant. MV-104 refers to the opposing side's motor vehicle report. Underneath that "FS 25" - the insurance search from the Department of Motor Vehicles. "When the blotter comes in" alerts the next person to make sure the aforementioned matters had been done (T:393). The secretary also filed

the retainer statement with the Judicial Conference.

On January 5, 1983, the next secretary made notes on the file and wrote "S&C" - referring to the preparation of the summons and complaint which were then sent to the process server and, in addition, copies were mailed to the clients to review the summons and complaint and return them.

On January 12, 1983, the next secretary wrote: "Come in - MT," meaning, medical treatment. She was to discuss with clients their damages, their "specials" (T:394-95). Underneath that is "Assignment to client to sign." Assignment is in no-fault cases. It is the client's assignment for the insurance company to pay the hospital and the doctors directly. Then follows on February 14, 1983: NFF signifying that the secretary sent the no-fault forms to each of the clients to fill out and sign (T:395-96).

On March 29, 1983, a summons and complaint were prepared again and the no-fault forms returned by the clients and mailed to the insurance company. "S&C, 3/29/83" - means that the secretary had forwarded a summons and complaint to a process server for reservice and a copy to the client (T:395-97).

RX K-1 - The xeroxed letter form they used to advise clients that a summons and complaint were being served on defendants, and asking the client to review them and sign before a notary public.

RX K-2 - The xeroxed form to prepare a bill of particulars (T:398, 408).

RX K-3 - A xeroxed letter for a bill of particulars, to be returned in 10 days.

RX K-4 and K-5 - Follow-up postcards when clients failed to return notarized, verified bill of particulars or summons and complaint. RX K-4: "Make an appointment to sign your bill of particu-

lars." RX K-5 "Kindly make an appointment to sign," leaving a blank thereafter. RX K-6 - "Kindly make an appointment to discuss your medical treatment," if they lacked sufficient information to obtain doctors' reports, hospital records, or prepare a bill of particulars (T:399-400, 408).

On the back of this case appears the notation 1-5-83 S&C, meaning summons and complaint were sent to the process server. The process server served it on February 21, 1983. On March 29, 1983, a mistake was noted in the summons and complaint, causing the summons and complaint to be redrafted on the same date. The original summons and complaint had omitted a cause of action for one of the clients (T:406-07).

In April 1983, an answer to the summons and complaint was received. It set forth affirmative defenses, including lack of personal jurisdiction (T:409). "Affirmative defense letter" was written

by Markovitz on top of the answer. This meant that respondent would send to defendant's attorney the process server's affidavit of service and a stipulation with a cover letter, requesting that the affirmative defense be withdrawn. Mr. Schwartz made a motion that the affirmative defense of lack of jurisdiction be stricken.[6] In addition, in October 1983, as a precaution, the summons and complaint were sent again to the process server for reservice (T:410-11).

RX H-1 - A memo of October 10, 1983 to respondent's process server in Lugardo vs. Folkes (T:411-13). On November 14, 1983, a verified answer and counterclaim, dated November 9, 1983 was received [PX38-1].

After respondent had received the original answer in April 1983, the clients were written to to come in relative to their medical treatment. That appears

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[6] Nothing further is related about this motion.

on the file front under date 4/28/83: "Come in, MT," meaning: medical treatment. Respondent had only one piece of medical April 28, 1983. Respondent made no request for an adjournment. On June 7, 1983, Rivkin, Laff, Sherman & Nadler wrote respondent (T:419-20, 567-68). The letter [PX35] follows:

> In order to obviate the necessity of making a motion to preclude in the above-entitled action, would you kindly send your verified bill of particulars at this time as same was demanded on April 8, 1983. (T:938)

The file was pulled upon receipt of the letter and someone in respondent's office made the notation: B/P on the letter, meaning: do the bill of particulars. It was marked RX P-4 (T:570). The bill of particulars was not prepared at that time because respondent did not receive Dr. Rivero's reports until August 29, 1983. The only medical in respondent's possession at the time was Dr.

Reid's regarding Mr. Lugardo's fractured nose.

PX35 does not include the notation "B/P" placed by respondent's firm on the above-mentioned letter (of June 7), RX P4 includes that notation (T:571). Schwartz had dictated a bill of particulars as evidenced by the front of the original jacket, which bears the notation: "10/10/83, B/P" (T:418, 422-23). The notice of entry on the bill of particulars conditional order of preclusion is September 27, 1983 (PX37-B). Respondent's bill of particulars had to be in the mail no later than midnight of December 1, 1983. Adding five days for mailing, defendant could not determine that the service was untimely until December 6. The bill of particulars was mailed on December 14, 1983 and thus did not comply with the preclusion order (T:423).

As stated above, Jeffrey [Schwartz] had dictated a bill of particulars on

October 10, 1983, was received by respondent on November 14, and a clerk pulled the file out of the dictation stacks without showing it to an attorney. This removal of the file was not in accord with the usual procedures of the office. Respondent looked at the bill since his handwriting is on the answer (PX38) (T:425).[7] It reads: "One, Allstate, answer counterclaim. Two, list of doctors. File to PSM" (meaning Paul S. Mirman). This meant that when the secretary completed the two items, the file was to be rushed to respondent. It was "almost immediately" realized that there was a preclusion order and the file was sent to Ms. Turchin's office to prepare the bill of particulars. The matter was then reassigned to Michael Palillo. Palillo phoned Rubin Nadler and requested an extension. Instead of returning his

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[7] The witness is in error when she states that respondent's handwriting is on the original answer (PX33). It is on the second answer (PX38).

call, RX I was served. RX I is a motion by Rubin Nadler, dated December 1, 1983 - and thus premature - to dismiss for failure to serve a bill of particulars. Palillo then wrote out in longhand - over respondent's name - an affirmation (RX 5 for identification) and it was typed and served on December 14, 1983 together with respondent's bill of particulars (RX J-2 for identification).[8] It was in opposition to defendant's motion to dismiss. On the front of the file appears the notation: "12/14/83, B/P, aff. in opp" (T:427-28, 430, 436, 438, 457, 460). Those motions were not filed in court; a note of issue to place the motion on the calendar was filed (T:441). Defendant's motion to dismiss was adjourned to May 8, 1984 (T:442). Schwartz (of respondent's office) had discussions with defendant's attorney who stated that he would not accept the bill of particulars. On

[8] See p. 94, infra.

March 14, 1984, respondent made a motion, returnable April 2, to extend the time to serve a bill of particulars, PX41, 41-A (T:443-44). Rivkin, Leff, Sherman and Nadler then withdrew their motion of December 1, 1983 to dismiss, so that it was never heard. Respondent's underlying opposition, outlined in Palillo's affidavit, was thus never before the Court (T:479). However, defendant then submitted a motion for summary judgment, dated March 26, 1984 - PX43-A - in response to respondent's motion for an extension of time to file the bill of particulars. Defendant referred to its prior motion which it had withdrawn. "Your affiant's motion pursuant to CPLR 3126(3) was adjourned to May 8, 1984, and has since been withdrawn so as to bring the present cross-motion for summary judgment" (T:457). Defendant's cross-motion for summary judgment and dismissal of plaintiff's complaint was granted, PX43-A (T:444-45).

Defendant's cross-motion, for summary judgment, dated March 26, 1984 in response to respondent's motion for an extension of time is contained in the record on appeal, RX H-2 (T:457-59).

The Appellate Division order - RX45-B - stated:

> Moreover, plaintiff's counsel did not contact the attorneys for the defendant to advise them of the reason for the delay, did not make a motion within the 60-day period for an extension. (T:483).

It is true respondent did not make a motion for an extension within the 60-day period. However, from the papers in its file, Mr. Palillo had contacted the attorneys (T:482-83). There is nothing in respondent's affirmation before the Appellate Division that contact had been made with the office of defense counsel (T:485). The Appellate Division did not have before it the underlying motion to dismiss and the underlying opposition (T:488). In the underlying opposition

papers on the motion to dismiss, Palillo explained that he had called the opposition asking for an adjournment to serve the bill and instead of a return call, the motion of December 1 was served on respondent (T:436-37). This was never before the Appellate Division.

A motion to renew and reargue Judge Scholnick's decision was denied and the Appellate Division held that no appeal lies from an order denying reargument (T:483).

It was respondent's practice to have its calendar cover only court appearances, examinations before trial, motions, physical examinations, but not bills of particulars. It prepared a bill of particulars when the answer came in; if it could not, a letter would be sent to the client to come in (T:575).

The Vasquezes, who had gone to a no-fault physical examination, moved back to Puerto Rico. Maria Garcia, whose "medicals" respondent had received, attended a

no fault physical in 1983 (T:496-97). The others may have gone to Puerto Rico. Lugardo stayed in touch with respondent (T:496).

RX M - Authorizations signed by Lugardo to procure his hospital records. It is contained in the bill of particulars and was a part of a discovery and inspection, dated 12/14/84, served that date on Rivkin, Leff, Sherman & Nadler, received by them on December 19 and returned to respondent on December 21 (T:498-99).

RX M-1 - Memorandum dated October 10, 1983 to Maria Garcia for her signature on "the enclosed," to accompany an authorization to be supplied to the defense (T:499-501). "Essentially," Maria Garcia abandoned the case (T:500-01).

RX N-1 - Request for authorization from a client to turn over to defendants in response to their request for medical information (T:501).

RX N-2 - Scheduling a physical of Ermelindo Lugardo with Dr. Ralph Olson on March 8, 1984, 1:30 p.m., at respondent's office (T:502-91).

RX O-1 and O-1 - Letters of January 25, 1985, and February 11, 1985 addressed to Lugardo in an unrelated case, presumably brought into respondent's office by Lugardo, to show that Lugardo was in respondent's office at about that time - on the issue of whether respondent notified Lugardo about the dismissal of his case (T:503-17).

The Appellate Division's decision was rendered on April 15, 1985 and notification by the Grievance Committee to respondent of a sua sponte complaint was dated August 27, 1985. PX48, dated January 1986, from respondent to Mr. Lugardo, reads in part: "I am writing you now to advise you that the court recently denied our motion" (T:511-12).

RX P-1 - Motion to vacate the dismissal of the action before Judge

Scholnick on a new set of papers, signed by Lugardo on September 14, 1985 - after the Appellate Division's decision. The motion was denied, RX P-3 (T:520-21, 538).

On February 24, 1987, Lugardo was advised to procure other counsel, if he desired (T:539).

RX P-2 - A letter, dated February 24, 1987, advising Lugardo of the outcome of his case. The letter states: "This may be considered our fault" (T:540).

RX R-4 - Letter of Rivkin, Leff, Sherman & Nadler, dated June 7, 1983 (already in evidence as PX35) but with the addition of B/P on it (T:571).

RX Q - Release. A malpractice action against respondent by Lugardo was settled for $5,000 (T:572-3). Respondent never heard again from the two Vasquezes who, it is believed, returned to Puerto Rico. Respondent never heard further from Maria Garcia (T:573-74).

Changes in procedure instituted in respondent's office subsequent to this cases regarding the preparation of bills of particulars were set forth (T:491-92).

Respondent now uses plastic folders to prevent them from falling apart (T:535).

PX43 - Testimony of Respondent Before Grievance Committee Counsel - 6/11/87

Re: Lugardo - Charge III

He was retained by Ermelindo Lugardo on November 11, 1982. She had been referred by Miguel Hernandez, an attorney, who has referred other cases to him (T:508). From 1974 to date, Hernandez has referred probably 200-250 cases. He split fees - he would get two-thirds and Hernandez one-third - based on their respective amounts of work (T:509). He detailed the work Hernandez performed (T:510).

Defendant demanded a bill of particulars, followed by a conditional order of

preclusion - the conditional order was granted. Respondent was given 60-days to supply a bill of particulars (T:523). It was not served during that period, resulting in an order of preclusion. The case was then dismissed on a summary judgment motion. An appeal was taken to the Appellate Division, Second Department, which affirmed (T:524).

There is a note in the file that on October 10, 1983 a bill of particulars was dictated. Then the defendant sent another answer on November 9, and the file was pulled out of dictation and that is why the bill of particulars was not served. Another note on the file indicates that the only medical records in the file pertained to Ermelindo Lugardo, none for the other plaintiffs (T:527). A letter - of which he has no copy - was sent to Lugardo and the others to come in (T:533). He doesn't know if Lugardo was advised of the Appellate Division's decision (T:534). Respondent's letter to

Lugardo, dated January 23, 1986, notifying him of the Appellate Division's decision was read into the record (T:544-45). He doesn't know if Lugardo received it. In August 1985, the Grievance Committee wrote respondent that an investigation into his handling of this case had been undertaken (T:546).

He has given up on Lugardo's case. Garcia cannot be found. The others have disappeared. One may be in Puerto Rico. Lugardo was advised to retain counsel, which he did. The case was settled for $5,000. He has a release (T:547, 552).

Charge IV - Montana

On September 17, 1978, Raymond Montana, a seven year old boy, had fallen in premises 27 Ingraham Street, Brooklyn. Respondent was retained as of counsel. Her recollection is that there had never been any contact with the plaintiff or his mother, Margarita Sanchez. On October 13, 1978, a summons and unverified

complaint were prepared against David Gechter - PX51 (T:582-84). A record abstract, dated October 10, 1978, by Record Abstract Corporation, 186 Joralemon Street, listed Gechter as the property owner. The abstract is an exhibit attached to PX52-B (T:588). No answer was received. A further title abstract was made and it was received on December 5, 1978; it lists David Gechter as the property owner and the taxpayer as 20 Jay Properties, Inc., 174 Rochester Avenue, Brooklyn. PX51 (the summons and complaint) has respondent's handwriting on it, indicating the name and address of the taxpayer. This information was placed on the summons to be sent to the respondent's process server to re-serve Gechter and not only at the address in the deed but also at the taxpayer's address. "Mr. Gechter may have some connection with the taxpayer or the taxpayer would forward the summons and complaint to an insurance company if there was an

insurance company" (T:590). Still no answer was received.

Respondent ordered another record abstract on October 8, 1981. Respondent didn't "have" his client, so he couldn't have a verified summons and complaint. Consequently, no default could be taken against Gechter in accordance with CPLR 3015(e).

Respondent sent for the hospital records, filed a retainer, obtained the record abstract twice, sent out the summons and complaint at least twice but the client never showed up (T:591-93). On the front of the file is a notation dated August 30, 1982, (clearly within the statute of limitations), stating "Come in" - indicating the client was written to - and the notation "cc to Frank Quintona, Esq.," the referring attorney (T:595). On November 10, 1982 and again on September 27, 1983 respondent wrote to the client. There are no letters to the

client in the file between 1978 and 1981 (T:596).

RX S - October 8, 1981 abstract. This is "somewhat confusing, because although it shows that David Gechter was the record owner of the property, it also confusedly shows in parentheses 'deed unto City of New York 12-27-73 when taxes paid will revert to David Gechter'" (T:597-98).

RX R - A 20-year title search, dated January 23, 1986, which shows that the City of New York had acquired the property from Caldwell Realty in 1973 in an in rem proceeding. In 1976, Anna Guy acquired the property, although no vacate order was found. "Apparently what happened was the City just never filed the vacate order." Anna guy transferred the property to Meir Gutfreund who in turn transferred it to David Gechter (also in 1976). In 1982 the City of New York acquired it in an in rem proceeding. Gechter still owned it in 1978. "The

clerk, however, on the record abstract made an error. Her error was that she wrote on our report that the deed will revert to the City of New York[9] when the taxes are paid. But that had been taken care of years before, otherwise you wouldn't have this type of transfer ... Three different people have acquired this property. This is just a mistake, just an error on here" (T:602).

As a result of the error made in the abstract, not realizing it was in error, respondent prepared a motion to serve a late notice of claim on the City of New York - PX52-A,B (T:603-04).

In 1982, Gechter failed to pay his taxes and the property was taken over by the City in an in rem proceeding. The City owned the property from 1973 to 1976 and in 1982 (T:607-08). "On the date of the accident, September 17, 1978, David Gechter owned this property" (T:622).

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[9] This should read "to David Gechter."

RX V - Original office file jacket in this case - RX15 (T:615). Between 1978 when the file was opened, and 1981 there are no notations on it (T:614). There is no correspondence in the file between respondent and the referring attorney during 1978. Respondent states that when the file was closed, any correspondence was destroyed as allowed by Appellate Division rules (T:615).

On October 8, 1981, respondent received the abstract which erroneously showed that the City owned the property (RX S). On November 10, 1981, respondent purchased an index number in an action for leave pursuant to Sec. 50(e) of the General Municipal Law to serve a late notice of claim against the City of New York and filed a note of issue for the motion, originally returnable November 30, 1981 (T:830). The motion was not decided until August 8, 1982 because of the City's delay (T:631). Respondent's motion was granted (T:634). The Appel-

late Division reversed (T:953). "The Gechter case is still alive and well, if anyone wants to pursue it" (T:954).

Receipted bills dated January 17, 1986 and March 5, 1987 from Central Investigation Group were marked RX V-1 and RX V-2 (T:758, 761). CIG was assigned to locate Margarita Sanchez and Ramon Montana. On January 17, CIG proceeded to 27 Ingraham Street and spoke to a Mrs. Ortiz, the owner, who informed the investigator that Sanchez had moved out seven years ago and she had no knowledge of Ramon Montana. CIG returned to the building on March 5 and no one at the address knew the clients (T:760-61). Respondent promised to try to locate the checks issued to CIG (T:762). Respondent, to date, has had no communication from the clients (T:767).

PX55 - Testimony of Respondent's Testimony Before Grievance Committee Counsel on April 24, 1987

Re: Ramon Montana - Charge IV

In October 1978, a summons was served on David Gechter in an infant's case. The case had been forwarded by an attorney, Quintona, with whom he had a 50-50 agreement. The Montanas never contacted respondent. The client had sustained a fracture of some sort.

A title report from Record Abstract showed Gechter to be the owner (T:371-72, 382-83, 391). Pictures were ordered. No answer was received (T:374). A second title search in December 1978 still listed Gechter as the owner (T:376). Respondent couldn't take a default since there was no certified summons and complaint. He wrote to the Montanas to no avail (T:378). A notation on the outside of the file reads: "Come in to sign summons and complaint" under dated 9/17/83 (T:379). Investigators were sent out a few times (T:379). He has a copy of the investigator's bill. The investigator reported that the client had moved out seven years ago (T:389).

In 1981, he conducted a third title search which indicated that the City of New York was the owner. Respondent won a motion to file a late claim against the City (T:385).

Charge V - Dodge

On August 27, 1985, the Grievance Committee wrote respondent regarding this case. In June 1965, respondent had moved the Court of Appeals for leave to appeal from an Appellate Division order, resulting in a denial for two reasons: (1) the order appealed from was not a final order, and (2) respondent failed to show that the order was timely (T:763-64).[10]

Mrs. Dodge had fallen and sprained her ankle or leg in the driveway of property owned by the New York City Housing Authority. There was no fracture. A notice of claim was served (T:765, 816).

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[10] Respondent promises to produce the letter from the Court of Appeals later on (T:765).

Medical records were sent for and pictures ordered. A lawsuit was commenced prior to a hearing (T:766).

RX W - Face sheet of the transcript of a hearing on June 19, 1982 in this case pursuant to a notice dated August 17, 1981. If a hearing is demanded, it is required under §50-I of the General Municipal Law (T:768, 791). It is a condition precedent to the commencement of a lawsuit. A complaint must be served within one year and 90 days. Prior to the hearing, a lawsuit had already been instituted. That explains why the hearing transcript bears the title Supreme Court (T:770). It is the transcript of the hearing held under General Municipal Law, §50-e (T:771).

Counsel for the Grievance Committee conceded that although the document itself labels it as an examination before trial, it was in fact a municipal hearing pursuant to a notice of hearing dated June 25, 1981 (T:776).

On February 24, 1982, a summons and complaint were first served, prior to the hearing date. At the time the summons and complaint were served, respondent knew that the service was a legal nullity (T:956). The hearing was held on June 29, 1982, before the re-service of the summons (T:784). The summons, PX57, was again served on July 10, 1982 (T:785), which was subsequent to the hearing date of June 29, 1982. So now respondent was in compliance with 50-I.

RX X - Receipt and report from process server for service of first summons (T:785-86).

PX58 - The answer of the New York City Housing Authority, dated April 6, 1982, to the first summons (T:786-87). It contained a demand for a bill of particulars. A bill of particulars was not prepared at that time (T:956). An affirmative defense in the answer states that the complaint is a nullity and should be dismissed pursuant to General Municipal

Law §50-I (T:787-88). Respondent made no motion with respect to that (T:957). In this case, when the summons and complaint were served, the condition precedent of a hearing under §50-I had not been met (T:788).

The hearing was supposed to have been held in August 1981 but the client did not show up. For that reason it was adjourned several times. Respondent was fearful that the statute of limitations of one year and 90 days for the service of a summons might lapse, and therefore had a summons and complaint served before the hearing. At one point, respondent wrote a strong letter to his client who had missed a hearing date. The statute of limitations expired on August 10, 1982 and the client did not show until June 29, 1982 (T:789).

On July 10, 1982 respondent re-served the summons and complaint - RX57 - which had been served originally (T:790). No stipulation discontinuing the first

summons and complaint accompanied it (T:965). The Housing Authority received it on July 13, 1982 (T:966). Respondent never received an answer to this second summons and complaint (T:966).

> And you don't want to take a chance, with somebody who is missing hearings, of her blowing the entire lawsuit. Here the law permits us to start a lawsuit merely with a problem called a condition precedent, so it becomes dismissable. Then we can restart it at any time. But if you don't start any lawsuit, that's the end of the case entirely, forever, so we did this as a protection (T:789-90). When the summons and complaint were reserved, at that point the condition precedent had been met ... Now, respondent was in compliance with the law (T:790).

RX W - Face sheet of the transcript of the hearing in this case, held on June 29, 1982 (T:791).

RX Y - Conditional order of preclusion, July 30, 1982, identical with PX60, excepting for the addition of notice of entry and affidavit of service (T:792).

RX Z - Motion for summary judgment by the defendant's firm, dated January 11, 1983, returnable February 3, 1983 (T:794). This was based upon the preclusion order (T:967).

Upon receipt of the summary judgment motion, Mr. Markovitz of respondent's office phoned Myron Weiner, the office manager of Gladstein & Isaac (T:794-95). Their conversation is incorporated into a letter of January 17, 1983, RX AA (T:796, 967).

The January 17, 1983 letter reads as follows:

> Attention: Myron Weiner, Esq.
> Pursuant to our phone conversation of this date I enclose a stipulation discontinuing the action commenced on February 24, 1982 prior to the municipal hearing held in this matter on June 29, 1982, which would be a nullity under the Municipal Law.
>
> Accordingly, kindly withdraw your motion pending in the first action for summary judgment returnable February 3, 1983 in Supreme Kings, Sp. I.

> I also enclose a copy of the second summons and complaint served on July 13, 1982 after the municipal hearing was held in this action. You owe us an answer to this summons and complaint. The is the only proper viable action pursuant to the Municipal Law.
>
> To same time I am also enclosing a bill of particulars and a reply to your demand for D&I served in the first action as I am sure your demands will be identical in the second action.
>
> Thank you for your cooperation in this matter. (T:977).

Respondent received no reply to this letter until the January 31 letter returning the bill of particulars - which was after the return date of the motion for summary judgment (T:978).

It wasn't until the above letter of January 17 was written, that respondent provided the defendant with a stipulation discontinuing the first action. This was after the motion for summary judgment had been served (T:976).

Respondent did not receive a stipulation of discontinuance of the motion

for summary judgment: "That's not how it was done. The parties answered on the return date: Withdrawn." Respondent never received any word from the defendant "one way or the next (other?) until they reneged on their agreement" (T:978).

RX AB - Letter of Gladstein & Isaac, January 31, 1983 - received February 7 - including respondent's bill of particulars verified January 17, 1983, thus rejecting it. That is the bill of particulars served pursuant to defendant's demand and after an order had been entered. At the bottom of the letter is Markovitz's handwriting: "You missed the point. It is a new order. You got to put in an answer. Stupid" (T:799, 968). The letter reads in part as follows:

> Accordingly, we cannot at this time withdraw our motion for summary judgment returnable February 3, 1983, in the Supreme Court, Kings County. (T:968).

The order granting summary judgment was signed on March 22, 1983 (T:969).

It had been represented to respondent that the Housing Authority's motion for summary judgment returnable February 3 would be withdrawn. Respondent did not receive the letter of Claude Gramico [member of Gladstein & Isaacs], dated January 31, until February 7, four days after the motion; respondent had never been told that Gladstein & Isaacs was reneging on the agreement between Markovitz and Myron Weiner. Respondent defaulted based on its reliance on that agreement (T:801, 820). A preclusion order was entered on July 30 (T:957). It was probably entered on consent. Respondent did not raise the issue that its summons and complaint were a nullity (T:957). In January 1983, the Housing Authority made a motion for summary judgment based upon the preclusion order, and returnable February 3, 1983. Respondent did not submit opposition papers because of an agreement with defense counsel that

the motion for summary judgment would be withdrawn (T:958).

Respondent moved to vacate its default and appealed from a denial of the motion. RX AC - record on appeal. RX AD - respondent's motion, dated January 3, 1985, to go to the Court of Appeals from the Appellate Division's denial (T:803-04). RX AD-1 - letter from the Court of Appeals with reference to the aforementioned motion (T:805). The Court of Appeals stated that the motion papers were incomplete. In addition: "I take this opportunity to call to your attention the fact that an order affirming the denial of a motion to vacate a default order or judgment does not appear to be one fulfilling the finality requirement of CPLR 5602(a)(1), and thus would not be one from which this court could grant leave to appeal in any event." The client was advised of the outcome and of her right to consult other counsel (T:806). The matter was settled for $5,000. A

letter from the new attorney and the general release were marked (T:807).

On May 10,, 1983, Mr. Markovitz wrote a letter - PX95 - to Gladstein & Isaac requesting an answer to the second summons and complaint which had been served in July of the preceding year. "If I do not receive an answer within the next seven days, I will take a default judgment against the New York City Housing Authority" (T:973). The letter makes reference to the prior action (T:974). On July 18, 1983, respondent made a motion for a default judgment (T:975).

PX 67 - Respondent's Testimony Before Grievance Committee Counsel - 4/27/87

Re: Renee Dodge [Charge V]

The Appellate Division dismissed this case on March 4, 1985. The decision is dated January 28, 1985. Respondent addressed the allegations of neglect in his letter of September 23, 1985 to the

Grievance Committee (T:449). The Appellate Division opinion follows:

> The plaintiff failed to serve a bill of particulars upon the defendant within the 60-day limit imposed upon her by a conditional order of preclusion, and her action is dismissed. Her subsequent service of an identical summons and complaint upon the defendant cannot properly commence a second action but was merely an improper attempt to evade the consequences of the preclusion order. (T:449).

A motion to appeal to the Court of Appeals was denied (T:461). The letter from the Court of Appeals was read into the record (T:814-15). Two months after the Court of Appeals' denial, the respondent first wrote to his client (T:462-63).

Respondent asserts that at some point the City decided to ask for a hearing on some cases but not on others. So he just served the summons and complaint without waiting for a notice of hearing. That is what he did in this case. He

served a summons and complaint, followed by a hearing, after which he served a second summons and complaint. The City stated in its answer of April 6, 1982 that the first summons and complaint were a nullity and should be dismissed pursuant to the General Municipal Law. Respondent agreed (T:453, 456).

On January 31, 1983, the Housing Authority wrote respondent as follows:

> The summons and complaint served upon the Housing Authority on July 13, 1982, is identical to that previously served on February 16, 1982, to which you were served with our answer on or about April 6, 1982. Accordingly, we cannot at this time withdraw our motion for summary judgment. (T:458).

Respondent failed to comply with the demand for a bill of particulars in defendant's answer. In respondent's answer, (to the Grievance Committee), he refers to his service of a second summons and complaint (T:450-1, 453). A hearing was held on June 29, 1982, and it was after that hearing that on July 13 re-

spondent served another summons and complaint. The notice of motion to preclude for failure to serve a bill of particulars is dated May 27, 1982 - prior to the hearing (T:666-67). The preclusion order was entered 17 days after respondent had commenced the second action but the motion had been made before (T:461).

Myron Weiner of respondent's office, on January 17, 1983, had written to defense counsel.[11]

The second summons and complaint were served after the motion to preclude:

> They have set up that affirmative defense of saying that's a nullity. The first action is a nullity. It's improper and unethical for them to now say wait a minute, that action was perfectly good. If they set up that as an affirmative defense, they can't come forth later and say their affirmatiye defense was a phony. It would be unethical for them to do it" (T:473-74).

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[11] See this letter reproduced on p. 76, supra.

He agrees with Mr. Markovitz of his office that the first summons and complaint were a nullity (T:487). This case was dismissed by the Supreme Court in 1983. He thinks there is no question the case should not have been dismissed (T:458). On August 1, 1985, he wrote to Mrs. Dodge after the Court of Appeals had denied leave to appeal (T:453, 462).

Mrs. Dodge hired counsel after respondent had lost his case, and respondent settled it for $5,000 (T:467). Mrs. Dodge had suffered a sprain, according to the hospital record; the liability was poor (T:464).

He personally conducted the negotiations with the other firm regarding malpractice (T:465).

Charge VI - Zaldua

Mrs. Zaldua, a Colombian, had been a passenger on a bus which made a short stop; as a result, she fell down and suffered a variety of soft tissue inju-

ries (T:820). A notice of claim was served upon Metropolitan and Suburban Bus Authority, as well as a bill of particulars. Respondent collected the medicals. A motion by defendant to change the venue from Queens to Nassau was granted (T:821). A notice of deposition was served on respondent (T:822). Mrs. Zaldua could not arrange for transportation to Nassau. An adjournment was granted. On the adjourned date, Zaldua and defendant's attorneys appeared; respondent did not. Respondent had not confirmed the date with his client and so did not appear. A final date was fixed, for which respondent had hired an attorney to appear. Mrs. Zaldua in the interim had left the country without notifying respondent. A motion to dismiss the case was granted on default. Six, seven months later Mrs. Zaldua returned to the country and called respondent about two months after that. Respondent moved to vacate the default; the court ordered

that Zaldua supply a hospital record authorization, costs, and appear for an EBT. Defendant appealed. The Appellate Division reversed (T:823-26).

The Appellate Division opinion reads as follows:

> Depositions were scheduled and adjourned at plaintiff's attorney's request on 16 separate occasions over a course of two years. Then there ensued three scheduled court-ordered depositions, at which plaintiff's attorneys never appeared and plaintiff appeared once. (T:981).

"We are dealing with a Hispanic woman, in a Nassau Court with a small case of limited value" (T:828). Mrs. Zaldua did not complain to the Grievance Committee nor file a civil suit. She was informed of the outcome (T:829).

Respondent doesn't know if there is anything in his office that would reflect the scheduled dates for the depositions (T:983). Respondent disputes the accuracy of 16 missed appearances, based on the

defendant attorney's records produced in the appeals brief (T:984).

PX96 - A schedule from the record on appeal. Respondent does not have a schedule which differs with this one (T:987). Respondent has no letters in the office file sent by him to Mrs. Zaldua advising her of deposition dates (T:988).

PX84 - Testimony of Respondent on 4/12/89 Before Grievance Committee Counsel

Re: Zaldua vs. Metropolitan Suburban Transportation Authority - Charge VI

He feels the Appellate Division "slanted" its decision (quoted at p. 481), against him (T:482).

He complied with the court order calling for a bill of particulars and rendered his reply to a discovery and inspection, which was deemed satisfactory. The only item he could not obtain from the plaintiff who was out of the country was the authorization from the Elmhurst Hospital (T:482).

The lower court had assessed $300.00 against him which Grievance Committee counsel said was a fine, but respondent claimed it might have been costs (T:483). The lower court allowed him to continue with the case, but the Appellate Division dismissed it. His client had left the country, abandoned the case in the middle of the process (T:485, 487).

The Nassau County Supreme Court decision on August 24 or 27, 1982, (read into the record), denied the application of the defense to dismiss the case but ordered a sanction of $250 against respondent for failure to comply with the court order of April 15, 1981 and ordered respondent's client to appear at the court and submit to an examination before trial (T:488-89).

Since this was a Nassau County case, he hired Ken Agoglia, a top Nassau County plaintiff's attorney (T;490). Respondent telephoned Agoglia that his client had returned to Colombia, South America. The

matter was on for September 14. Agoglia phoned defendant's attorney for an adjournment which was refused (T:491). Agoglia's affidavit to that effect, submitted to the Appellate Division, was read into the record (T:491).

The Appellate Division stated that respondent had adjourned the case 16 times. That is "ridiculous" (T:492). EBT's are constant by adjourned by attorneys (T:492). Agoglia thought the file had been returned to respondent in 1979. It was not until June 1982 that Agoglia found the file and personally brought it over to respondent (T:493).

"The Appellate Division is prima facie wrong because in the chronology, the defendant himself said that three times was at their request." It's prima facie wrong" (T:500).

Adjournments of EBT's are not reflected in office files (T:494).

Charge VII - Austin

This case involved an uninsured motor vehicle accident with minimal - no permanent - injuries. The medical bill for three visits to the doctor was $108. Austin had a big black and blue mark. Respondent filed a claim against Austin's own insurance company for uninsured motorist benefits (T:829-30). "Within 90 days of the accident or as soon thereafter as may be practicable, notice of intention to make the claim or notice of the claim is forwarded to the uninsured motorist carrier." Thereafter, six years are allowed to demand arbitration by the American Arbitration Association. Respondent obtained Austin's medical information and the insurance status of the other vehicle (T:831). Respondent procured a revocation order from the Motor Vehicle Bureau which showed that the offending vehicle had not insurance, that the license of the car's registrant to drive had been revoked (T:832). The

insurance company moved in Queens County to stay arbitration (T:833-34). It contended that there was not a timely notification of the intention to raise the uninsured motorist issue and secondly, that there was insurance coverage by Criterion Insurance Company. The court rejected the timeliness contention but set it down for a hearing on the insurance issue. After having come on approximately three times, at the fourth session it was referred to a trial judge - Judge Hyman (T:833-36).

Someone in respondent's office was assigned to monitor the proceeding in court, not to participate in the hearing in any adversarial capacity. It did not matter to respondent, given the nature of the injuries, which insurance company was the one against whom respondent was going to make claim ultimately (T:837). Involved was a contest between Criterion Insurance and American Security Companies. Michael Palillo of respondent's

office, who had taken the Bar but was not yet admitted, was assigned to attend court and indicate that respondent's firm was present but not participating. Palillo was also to drop off papers in Supreme Court, Nassau County, at one of the submission parts (T:838-39).

RXA7-1 - A calendar, a loose yellow sheet, from respondent's office for 11/22/82 includes the case before Judge Hyman. It reads: "Supreme Queens, Part One. American Security v. Austin." It is number eight on the calendar. The initials MP appear, referring to Michael Palillo. It looks like the handwriting of Tom Markovitz, office attorney in respondent's office (T:839-41, 843-44, 851).

XAG - A court card kept in the Supreme Court, Queens County, in the case of American Security vs. Austin, a non-jury case. It shows that the case had been on the calendar October 13, October 27 and November 22. A representative

of respondent's office had appeared on each occasion but the last. The notation for November 22 reads: "Final." The result is recorded: "Decision for petitioner"; and there was a stay of arbitration (T:853). Mr. Palillo arrived late. The court decided, as respondent had contended, that the car was uninsured. The attorney for American Security, however, had raised an additional issue, that of timeliness (T:854). Respondent then made a motion to vacate that portion of Judge Hyman's order regarding timeliness (T:856). It was denied without prejudice to renew upon a copy of the transcript and an affirmation or affidavit of the person assigned to cover the hearing (T:856). The renewed motion was denied outright by Hyman for three reasons: (1) the excuse of Mr. Palillo first dropping off papers, and then arriving late was unacceptable; (2) respondent was incorrect on the issue of timeliness of the notice to the uninsured

motorist; (3) Palillo's affirmation was unsigned (T:858). The judge said that the excuse was grossly inadequate and an example of inadmissible law office practice (T:861).

An appeal was taken from the denial of the second motion (T:875-76).

PX87-A - The court's decision on appeal reads as follows:

> Appellant failed to offer a valid excuse for his default, as required by CPLR 501-5-A1. Specifically, the affirmation of the attorney assigned to the case was not signed and was therefor of no force or effect. CPLR 2106. Consequently, the trial court did not abuse its discretion in refusing to set aside the default judgment. (T:876-77).

A communication was thereafter sent to Mr. Austin. Respondent considered making a motion to renew upon a signed affirmation, but Austin, who was spoken to, was not interested (T:878).

The charge originated by the Grievance Committee reading the court's decision, not by the client. No civil pro-

ceeding was brought by the client against the firm (T:879).

PX90 - Testimony of Respondent Before Grievance Committee Counsel - 1/16/89

Re: Robert Austin - Charge VII

554 - He does not recall meeting Austin but spoke to him on the telephone. Austin had very minor injuries - "left shoulder, ankle." Austin had visited a doctor three times (T:554, 569). The medical records of Flushing Hospital and of Dr. Glasser were produced. The case was referred to him by Mr. Chesnor, an insurance broker (T:555). Chesnor was not compensated for the referral. It was determined that the defendant had no insurance or there was such a claim made (T:556). He instituted an uninsured motorist proceeding. Mr. Palillo of his office did not have to attend the hearing since it was a question of coverage between two insurance companies (T:557). He had an attorney, nevertheless, appear

to make sure that respondent is not needed, but the attorney arrived a few second too late (T:559, 564).

A print-out from the Department of Motor Vehicles shows Criterion to have been the insurance company, but Criterion denied coverage and the issue of coverage was set down for a hearing (T:562). Palillo was assigned to appear (T:564). Before proceeding to Queens, Palillo dropped off some papers in Supreme, Nassau (T:565). The Appellate Division said that Palillo's affirmation to reopen the case was unsigned (T:568). If he had gone back to Judge Hyman with a new affirmation, the default might have been opened (T:568). However, he felt it ridiculous to continue with "such a case" and called his client. His client said: "What case?" The client didn't even recall that he had such a case and voiced no objection to dropping it. An affirmation of Mr. Markovitz in October 1983

refers to Austin's injuries as "serious." "That's a term of art." (T:573)

Case VIII - Raymond Gonzalez

This was an uninsured motorist proceeding involving a car accident with Konwin Teague. The police report was unclear whether Teague's vehicle was registered in New York, - N.Y. - or New Jersey - N.J., so respondent sought to procure the insurance information from both states. Respondent ascertained that there was no insurance, the car was unregistered, and demanded uninsured motorist arbitration. The petitioner insurance company, Nationwide Insurance Company, moved to stay the proceedings and filed a note of issue. Petitioner contended there was insurance but never presented any proof; the judge set it down for a hearing (T:881-83).

RX A-5 - (a) Note of issue and (b) a copy of the Calendar Watch card for this case.

On November 17, 1983, respondent received the revocation order issued by the Motor Vehicle Bureau. On December 8, 1983, the Bureau wrote to the uninsured owner-driver - RX AK - asking him to present his insurance information, if he has it, within 10 to 15 days; if he didn't, his privileges would be revoked.

RX AL - Notice of financial security revocation, 12/16/83.

The matter was set down for a hearing. It was conferenced and then set down for trial (T:887-88). It came on on November 23 and respondent intended to ask for an adjournment pending receipt by it shortly of the revocation order - which would be conclusive that there was no insurance. In fact, the revocation order arrived on December 16. Respondent had assigned a law clerk, Bruce Marx, to appear on November 23. Marx came to Part 11 and sat through a calendar call (T:890). Marx then looked through the various parts in the hall until he came

to the part when he saw respondent's case on the calendar. The order had already been granted by default. A motion to reopen was denied. An appeal was taken, resulting in a reversal and the case was restored to the calendar. Respondent had the revocation order and the petitioner withdrew its petition to stay arbitration. They proceeded to arbitration, resulting in an award of $8,500.

RX AQ - A letter, 4/18/88, from the American Arbitration Association to respondent and to Judge Spencer, the insurance company's attorney, advising that Joseph Guccalone had been appointed as the arbitrator.

RX AR - Notice of hearing from American Arbitration Association, 6/6/88, advising all parties that the matter had been set down for a hearing on July 6, 1988, before the arbitrator.

RX AS - Cover letter from the American Arbitration Association, July 22, with the arbitration award, July 13,

1988, to Raymond Gonzalez of $8,500 (T:897-98). The arbitrator denied recovery to Mirman Gonzalez for loss of services, which are not actionable in an uninsured motorist arbitration (T:898).

Since the rules provide that an attorney appear in Part 11, to which Marx, a law clerk, had been sent, and be ready to proceed to trial, respondent was ordered to pay and he paid $1,000 costs. Respondent had lawyers in the Supreme Court available if the case had to proceed. The Appellate Division's decision is PX83 (T:891-93).

The Court's opinion follows:

> The Court noted with disdain the deliberate flouting of the rules of Part 11 by respondent and would argue that such dilatory conduct is inimical to the order administration of the trial calendar. (T:892).

RX AR - Appellant's brief; RX A-1 - the reply brief on appeal (T:894-96).

RX AP - The Court Calendar in this case (T:896).

RX AT - The release and trust agreement (explained) signed by Mr. Gonzalez on August 10 or 11, 1988 to Nationwide Insurance (T:898-99).

RX AU - Respondent's letter, August 10, 1988, forwarding the documents to Nationwide (T:899).

RX AV - Respondent's closing statement and carbons of the checks written to Mr. Gonzalez and to respondent's office for its fee (T:900-01).

Innovations in office management were set forth (T:908-14).

Paul S. Mirman, called as a witness at this point by petitioner, relative to RX J-2 for identification[12] (a handwritten affidavit), testified as follows:

His signature appears on this exhibit - an affirmation in opposition and a bill of particulars - exhibit (T:461). Michael Palillo of his office (who had

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[12] See p. 62, supra.

passed the Bar but doesn't think was yet admitted) prepared it. Palillo's handwritten undated notes indicate that Palillo had contacted Rivkin, Leff, Sherman & Nadler by telephone; since their motion was received on December 1, 1981, Palillo must have contacted that firm before December 1 (T:465-68). Decision on this exhibit was reserved pending the testimony of Mr. Palillo (T:476).[13]

RX I - Motion by Rivkin, Leff to dismiss for failure to serve a timely bill of particulars.

Michael Palillo, an attorney, admitted in 1984, was employed by respondent during the period 1983-84 (T:638).

RXJ - An affirmation in opposition is in the witness's handwriting (T:642,

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[13] Subsequently, during Mr. Palillo's testimony, it was received subject to connection with the understanding that it was not part of a court record (T:658). No further action was taken regarding it.

646). After reading RX J, his memory is not refreshed with regard to the Lugardo case (Charge III, supra). He has no recollection of contacting the law office of Rivkin, Leff, Sherman & Nadler concerning the Lugardo matter (T:648). He cannot say if RX J-2 for identification is the final version of RX J (T:650). He cannot say if he prepared the bill of particulars attached to RX J-2 (T:651). The only difference he sees between RX J and RX J-2 is that the front page of RX J is not the same as the first couple of paragraphs in RX J-2 (T:648).

RX J3 for identification - An affirmation in an unrelated case, "Aetna Casualty v. Hilda McIntosh, et al. (T:672, 674).

He has no recollection of being present in the Supreme Court, Queens County, on November 22, 1983 in connection with the Austin case (Charge VII, infra.) He cannot identify RX-AF1 for identification (T:676-78).

RX-AF1 for identification - hand-written calendar sheet for 4/22/83.

RX-AF2 for identification - calendar sheet for 11/28/83.

RX-AF4 for identification - calendar sheet for 1/3/84.

RX-AF5 for identification - calendar sheet for 1/10/84.

RX-AF6 for identification - calendar sheet for 1/12/84.

RX-AF7 for identification - calendar sheet for 1/16/84 (T:691).

RX-AF8 for identification - calendar sheet for 1/17/84.

PX86 (record on appeal in the Austin case at pp. 66-67) is an affirmation in Mr. Palillo's name, dated April 2, 1984, without a signature. That does not refresh his recollection that he went to Queens to cover the Austin case on 11/22/83 (T:700-01).

He was admitted to the Bar on March 11, 1984. In the above affidavit appears the following: "I am an attorney

who was assigned to the above-captioned matter on November 22, 1983." The document is unsigned (T:701-02). It is an incorrect statement. He didn't prepare it (T:701-02).

He does not remember another matter in Supreme Court, Nassau County, appearing on the same day. He does not remember attempting to conclude a matter in Nassau County, as set forth in the affidavit, and then proceeding to the framed-issue trial before Justice Hyman (T:702). He does not recall, as claimed, that the Nassau County matter took longer than anticipated. He does not recall traffic congestion causing him to arrive too late to make an appearance in the Austin matter. He has no recollection of preparing the draft of the affidavit marked AF (T:703-06).

He testified: "... if I had a case dismissed against me, I would have remembered. I would remember a case that was dismissed against me" (T:744).

RX-AF9 - calendar call for 1/24/84.

RX-AF10 - calendar call for 7/24/84.

RX-AF11 - calendar call for 2/27/84 (T:691-92).

These exhibits do not refresh his recollection as to dates he was assigned to cover court matters (T:692).

RX-AF - He recognizes some of the writing in blue ink as his, the rest he does not recognize. Most of the handwriting appears to be his but he has no recollection of preparing it. It is a photocopy of an affirmation in American Security Insurance v. Robert Austin and it contains pencil scribbling and blue ink at the bottom (T:693-96, 702-04). It is a draft of Markovitz's affidavit in PX86 but is not identical with the final typed version in the record on appeal in PX86.

On November 22, 1983, respondent had three cases in the Supreme Court, Special I, Nassau County calendar. Respondent's calendar bears the initials "MP" along-

side these cases as well as the initials "MP" alongside the Austin case in Queens (T:750).

Jeffrey Schwartz, an attorney, an employee of respondent since August 1, 1983 testified that in September or October 1983, he first became acquainted with the Castillo case [Charge III] (T:1083). He was assigned to oppose defendant's motion to dismiss based upon §3215-C of the CPLR relating to the failure of instituting proceedings for a default judgment within one year of the default. A lawsuit had been commenced; there was no answer (T:1083-84). The vehicle in which respondent's clients were passengers was insured by Geico. The defendant was insured by Aetna Insurance (T:1081-85). Action was commenced against the owner and operator of the vehicle in which respondent's clients were passengers as well as against the owner and operator of the vehicle which had struck the vehicle carrying respondent's clients. Numerous

letters had been sent to the insurance companies asking for an answer. Geico made a motion to dismiss. He prepared an affidavit in opposition and instituted proceedings for a default judgment (T:1086). Defendant's motion to dismiss was granted on default due to his non-appearance. He had been delayed in traffic. He was then a law clerk and was to answer the calendar call pending the arrival of an attorney to argue the motion. He does not recall having any conversation with the opposing attorneys (T:1087). He prepared the draft of a motion in respondent's name. The motion was granted to the extent that the default was excused but the court denied the motion without prejudice to renew because an affidavit of merit was lacking. He then obtained affidavits of merit from two clients and renewed his motion (T:1089). Again, the court denied the motion without prejudice to renew. He interpreted the court's opinion to

mean that a doctor's affidavit was required in order to qualify under the no-fault law. He contacted Dr. Rivero but was unable to obtain an affidavit of serious injury from him. The doctor stated that he had not seen the plaintiffs in several years and the injuries were minimal - not permanent nor serious. Ultimately, in January 1986, respondent filed with Geico for an uninsured motorist arbitration since the defendant's car, previously thought to be insured by Aetna, turned out to be uninsured (T:1090-93). A settlement was reached (T:1094)

RX BB - Three copies of letters signed by respondent from the Castillo file - one undated, one dated June 8, 1983 and the third October 27, 1983 (T:1128-29). They were sent to the defendant's carrier to answer the complaint (T:1116).

Charge III - Lugardo

In the Lugardo case, on October 10, 1983, he dictated on a dictaphone machine a bill of particulars in response to a conditional order of preclusion (T:1095). It was not transcribed; the tape has been lost (T:1096, 1112). The file had become separated from the tape - the file was erroneously taken from the dictation stack by a file clerk in response to a direction to get the file when a second answer to the complaint herein had been received in the mail. He saw the second answer much later after respondent's appeal had been lost (T:1097). Based on a subsequent review of the file, the second answer came in on November 14, 1983, approximately a little over a month after he had dictated the bill of particulars. The second time the file came to his attention was in early December 1983 by a motion for dismissal due to failure of compliance with the preclusion order. Mr. Palillo was assigned to work on the

motion, "having been previously given the bill of particulars to work on," which was not the one he had dictated (T:1100-01). There had been a second demand for a bill of particulars accompanying the second answer. he is not certain if Palillo was aware of the preclusion order, though he believes Palillo was (T:1102). Palillo, with whom he discussed the matter, was having trouble with the bill of particulars because he did not have answers to all the questions. He told Palillo that the law permits the inclusion of the clause "to be provided" in a bill of particulars and since there was a preclusion order, the bill of particulars must be gotten out as soon as possible (T:1103). He does not recall discussing the problem either with respect or Ms. Turchin, confronting them with the preclusion order, but believes he did (T:1126). Palillo told him of his effort to obtain an extension of time prior to the expiration deadline. Howev-

er, opposing counsel in a letter rejected the bill of particulars served on December 14, 1983 because it was approximately 12-14 days late (T:1103-04). The opposing side's motion to dismiss was never heard; it was adjourned by defense counsel from December to May and subsequently withdrawn. The file was reassigned to him and he contacted defense counsel and spoke to Craig Bruno of that office, who refused to accept the late bill of particulars (while the motion to dismiss was still pending).[14] He made a motion to extend the time to serve the bill of particulars (T:1106). Defendant withdrew the previous (pending) motion to dismiss and served a cross-motion for summary judgment based on the preclusion order (T:1108). Judge Scholnick denied his motion and granted the cross-motion. He made a motion for renewal and reargument

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[14] Respondent advised his client of the status of the case at that time (T:1107).

based on his conversations with Palillo to the effect that there had been difficulty in obtaining medical documentation; that all the questions could not be answered and there were numerous plaintiffs, therefore a 12-day delay should be excused (T:1109). The defense characterized the motion as one for reargument, not renewal, because the additional facts should have been set forth previously. The judge denied "the motion for renewal and reargument." A joint appeal was taken from the two aforementioned orders. The lower court's decisions were affirmed (T:1109-10).

Lugardo was advised of the outcome and Lugardo's claim against the firm was settled (T:1107, 1112).

Thomas R. Markovitz, an attorney in respondent's office, testified relative to a number of charges.

Charge I - Kantor

In May 1983, Mrs. Kantor wrote a letter inquiring about the status of her case. He advised her over the phone that the case was pending on the calendar, "as indeed it was." In 1980, it had been placed on the calendar. What he did not know then, since there was noting in the file to indicate it, the case had actually come up for trial earlier, had been conferenced in court but had not been advanced by the court clerk. The file indicated that sometime in 1980 it had been placed on the Supreme Court calendar. The matter came to a head in 1983 when she wrote respondent: "I am frustrated. What is doing with my case?" A check then disclosed that the case had been transferred to the Civil Court in 1981, had been adjourned several times in the Civil Court, the last time to June 1981. But the case did not appear on the June 1 calendar nor thereafter. Nothing in the file indicated that the case had

appeared on the Civil Court calendar several times. "If there had been such a notation, the problem may never have arisen, but there was nothing in the file to indicate that" (T:1135-36). The only one in the office who knew that the case was in Civil Court was Mr. Levine "but he was no longer with the firm" (T:1136-37). the court clerk told respondent to prepare an ex parte order and the case would be restored. Respondent did that. A few days later, they were advised that the proper procedure was to make a motion upon notice to the other side (T:1138). A motion was made and in January 1984 the case was restored to the calendar. Mrs. Kantor received a payment on a settlement (T:1139).

RX BC - A copy of the letter Mrs. Kantor had sent to respondent, dated May 26, 1983, and received from the Bar Association, and the return receipt (T:1141-42). When the case came in in 1981, he saw Mrs. Kantor to execute her

deposition transcript which he notarized, and they discussed her case (T:1142). His guess is that the case was transferred from the Supreme Court to the Civil Court towards the end of 1980. His file did not reflect that fact (T:1144-45).

The following colloquy ensued:

> THE REFEREE: Weren't there several appearances in the Civil Court by your office?
>
> THE WITNESS: Yes, but as I was indicating before, the person that went to those appearances --
>
> THE REFEREE: Why wouldn't that be in the file?
>
> THE WITNESS: Because the person that went to Civil Court made no notation of those dates. (T:1165)

Susan Sohmer was watching respondent's cases in the Civil Court and would remit to his office on a weekly or bi-weekly basis "what was appearing on the Calendar in Civil Court" and reliance was placed on her list. It was not the prac-

tice of the office, however, to have notations on the outside of the file or in the file (T:1145-46). But the office had a red diary where they noted the dates of court cases (T:1147).

Re: Lugardo - Charge III

He interviewed Lugardo when the latter first came into the office and spoke to him (T:1150), and again in 1983, 1985, 1986 and 1987. In 1985 he spoke to Lugardo while an appear was pending. Lugardo brought in two letters he had received from attorneys in connection with a countersuit against him. One of the letters was an "excess letter" - meaning that he was being sued in excess of his insurance policy and has a right to his own attorney and that counsel would be appointed for him. He explained the letters to Lugardo. He told Lugardo that the case herein had been dismissed on appeal by reason of a "minute technical thing." He advised Lugardo that he

expected the case to be reversed by a higher court and would advise him (T:1152-53). After the appeal and post-appeal motions were lost, Lugardo was advised to retain counsel in a possible malpractice suit. The case was settled with an attorney (T:1154).

Lugardo was not told to retain other counsel until after the Grievance Committee had notified respondent that it was looking into the matter, but that was because until that time all of the appeals and "other possible routes" had not been exhausted. There was a post-appeal motion before Judge Scholnick to reconsider his decision. At that point Lugardo was told (T:1220-23). Respondent attempted to show Scholnick that he had been sidetracked with the second answer and hadn't discovered that he had received two answers until after the appeal had been written. The motion was denied. At that point Lugardo was told (T:1220-23).

Charge IV - Ramon Montana

This file came to his attention during a file review (T:1154). The file had at least four or five letters to David Gechter, the owner, asking him to interpose an answer; all the letters had been returned (T:1155-56). There was no answer in the file but it contained letters to the client to come in to review the "facts, medicals, verify summons and complaint..." In 1984, the file was stripped; consequently, the letters are not available but the file was full of letters returned. He called Frank Quintana, the referring attorney, who said he would check but never did call back (T:1150, 1163, 1226). In September of October 1981, he ordered another record abstract. "Sometimes a taxpayer changes on a property." He received a report which read: "Deeded to the City, 1983. Will revert to owner upon payment of taxes." It meant to him that the City owned the property in 1978 since there

was no other notation that it had reverted to the owner. He decided to make a motion to file a late notice of claim with the City, and he did in November 1981 (T:1157-58). He also tried unsuccessfully to contact his client at that time. The motion was heard in May 1982 and was granted. The City appealed, the Appellate Division dismissed. Subsequently, he learned that the City did not own the property at the time of the accident (T:1161). He can't understand why respondent's appeals attorney, Helen Balsam, didn't say: "The City doesn't own it. What are we doing?" In 1986, an investigator advised respondent that the plaintiff had moved out several years earlier, according to a neighborhood tenant (T:1162-63).

Charge V - Renee Dodge

In the Dodge case, after filing a notice of claim with the Housing Authority, he received a notice of statutory

hearing, he thinks, for August 1981 (T:1164). The hearing took place in 1982. Under the General Municipal Law, §50-H, a summons and complaint must be served within one year and 90 days. First the notice of claim must be filed, after which a hearing is held. Following that, a summons and complaint are served (T:1165). The summons in this case was served prior to the time it should have been served; namely before the hearing. His rationale follows:

> If you started your action within the year and 90 days, even before a hearing, then if the case continued later on and came up in court and the other side objected at trial even --- if the summons was started prematurely and your case got dismissed, you can under 205-B within six months save your case by just serving a new summons.
>
> On the other hand, if you never served your summons and complaint within the year and 90 days, then you had nothing to serve, you never had an action. (T:1166).

Mrs. Dodge missed two hearing appointments. The year and 90 days were "quickly approaching." So his service of the summons and complaint preserved the action (T:1166-67). He does that routinely. The City of New York has set up a procedure which takes into account that things happen out of sequence. One commences an action early, then holds a hearing. The City has a ready-made stipulation given to counsel, telling him that if he has already instituted an action, to re-serve his summons. If counsel never started an action, he was lost. If he did start it, even if it got dismissed because it was out of sequence, he can serve it after the hearing was held (T:1167).

Respondent received an answer from the Housing Authority lawyers which included an affirmative defense that the action was a nullity because it commenced prematurely before a hearing had been held. On June 29, 1982, a hearing was

held. Thereafter on July 13, 1982 - about two weeks later - the identical summons and complaint were re-served. This was a good summons and complaint and in his opinion, the prior one was a nullity (T:1168, 1229). When he served the second summons and complaint on July 13, 1982, he did not send along a stipulation of discontinuance for the first action, nor a letter. But he did send such a stipulation - "it must be" in January 1983 (T:1232).

He did not supply a bill of particulars demanded in the answer to the premature summons and complaint because he considered them a nullity. Nor did he write the Housing Authority that he was not providing a bill of particulars at that time. "It was going to be a waste of time because I was going to have to do all of this all over again, but they answered in my validly commenced action, so I didn't do the bill of particulars." A motion to preclude was made dated

May 27, 1982, returnable June 10, 1982, and an order was entered thereon. The preclusion order was granted "on consent unless etc., etc., 60 days." He did not serve a bill of particulars pursuant to that order nor advise the Housing Authority by letter that he was not providing it. As previously stated, a hearing was held on June 29, 1982, at Gladstein & Isaac's office. The preclusion order was dated perhaps a week or two after the re-service of his summons on July 13, 1982. A motion for summary judgment, based on the preclusion order, followed (T:1169, 1229-32). Instead of an answer to his new action, he was served with the motion for summary judgment, dated January 11, 1983 and returnable February 3, 1983 (T:1239). He did not make a motion to extend his time for submitting a reply since he felt he had a valid action in which he was looking for an answer (T:1237). Even though the court granted summary judgment and dismissed the com-

plaint, he felt that it had no bearing on the second summons (T:1243).

He had called Myron Weiner, managing attorney of Gladstein & Isaac, and asked for an answer in his good action. He asked that the summary judgment motion be withdrawn and he would serve a bill of particulars. Weiner agreed (T:1170, 1235). It was his understanding that the motion was going to be withdrawn and that an answer would be interposed to the second complaint. He sent a bill of particulars based on that understanding (T:1254-55). He wrote Weiner, RX AA - confirming the conversation and included a stipulation of discontinuance of the prematurely commenced action. Instead of an answer, his letter, dated January 31, was returned to him and was received by him on February 7. His purported bill of particulars was in that letter. They advised him they were not withdrawing their motion.

On December 6, 1983, he wrote an affirmation in reply to the opposition affirmation of Claude Grammatico to his motion to take a default judgment against the New York City Housing Authority based on the second summons and complaint served on it (T:1255). His reply affirmation embodied his concept of the law regarding the viability of the first summons and complaint and of the second summons and complaint. His reply affirmation is dated one year after his January 1983 telephone conversation with Weiner (T:1256).

RX BE-1 - Notice of motion and respondent's affidavits.

RX BE-2 - The affirmation and documents in opposition.

RX BE-3 - Reply affirmation and accompanying documents (T:1262).

The summary judgment was granted in an action he deemed a nullity and he felt he was entitled to an answer in his validly commenced action (T:1171, 1230-32,

1260). He made a motion for a default based on the second summons and it was denied.

The respondent made a motion to vacate the order of preclusion and summary judgment and that was denied. On an appeal to the Appellate Division, that court disagreed with respondent's interpretation. The court said the action was not void; it was voidable (T:1172).

The client was advised of the problem and to secure counsel, which she did and the claim was settled (T:1173).

Re: Charge VII - Austin

Austin was an uninsured motorist case. A claim was made against Austin's own insurance company, American Security Insurance. American Security tried to stay the action - a Queens case - contending that the other vehicle was insured by Criterion Insurance Co. and further, that respondent's notification to American Security was not timely.

Respondent contended that American Security had been notified timely within the 90-day period of time allowed. Judge Lerner set the case down for a hearing only on the issue of insurance (T:1173). Criterion was added to the case and it filed a note of issue and the case was set down for November 22. Palillo of respondent's office was assigned to the case. Palillo was also asked to proceed to Nassau County that morning to drop off motion papers. Palillo arrived in Queens late. The case was defaulted and a stay of arbitration was granted (T:1174). The issue now was between the two insurance companies and respondent was not directly involved in that contest (T:1177).

The case was sent from Trial I to Judge Hyman on a framed-issue hearing. American Security then raised the timeliness issue (T:1175, 1178). Since respondent was not present to object, the motion was granted and arbitration was stayed (T:1179). He made a motion to

vacate Hyman's order. It was denied. Hyman required a transcript of the proceedings and an affidavit from the period who was supposed to appear before him (T:1180). He signed his affidavit but Palillo didn't sign his. Hyman denied the motion by reason of the unsigned affidavit. An appeal was denied on the same ground. The matter was not placed before Judge Hyman again with a signed affidavit by Palillo because the appeal raised a different issue. Respondent contended that Hyman had exceeded his authority in deciding an issue of timeliness which had been raised but which was not part of the underlying order of the trial judge who had set the matter down for a hearing by Hyman (T:1253).

Austin had minimal damage and decided not to pursue the matter (T:1181). "Two visits to the doctor doesn't an injury make" (T:1182).

RX AF-1 - A copy of the daily calendar for November 22, 1983 which he pre-

pared. The Austin case appears on it as: Supreme Queens, Part One, American Security vs. Austin. In his handwriting the initials MP (Michael Palillo) appear as the person assigned to answer the calendar (T:1182).

Charge VIII - Gonzalez

The Gonzalez case was similar to Austin, involving an uninsured motorist claim. It was set down for a framed-issue hearing on the issue of insurance for the offending vehicle. Bruce Marx of respondent's office was assigned to appear in court on the case (T:1183). It was Marx's first court assignment. The case was in Part 11, Judge Ostrau's part. Marx went to Park One and couldn't find the case. About noon, Marx phoned him. Subsequently, respondent was served with an order staying arbitration on default (T:1184). An appeal was taken (T:1188). The default was excused and the judgment vacated. The case was restored to the

Supreme Court calendar. When the case was reached, respondent by that time had received a revocation order - that insurance had been revoked - and the attorney for Nationwide Insurance withdrew its petition and admitted that there never had been insurance. Accordingly, the case was processed through uninsured motorist arbitration and he believes Gonzalez was awarded $8,500 (T:1188).

RX AL - Motor Vehicle Department's revocation of license of Konwin Teague, owner, December 16, 1983, and it refers to the accident of May 20, 1981 between Konwin Teague and Ramon Gonzalez. It was received after the default (T:1188).

Bruce Marx, an attorney in respondent's office, testified that he went to court for the first time in the case of Gonzalez vs. Unigard Mutual - an uninsured motorist claim [Charge VIII] and was to ask for an adjournment. Palillo had told him the courtroom was on the first floor of the Supreme Court build-

ing. He did not go initially to Part 11, the part he thinks he was told to go to. "I just got confused and I went to Special 1" (T:1183-84, 1196, 1200-01, 1205, 1108). He believes he went to Special One, Room 148. Arriving probably between 8:30 and 8:45, he waited around until about 9:35 or 9:40, when he started to look for the correct courtroom, upon learning that he was in the wrong one. He was told there was a calendar outside the courtroom. It was the only one on the first floor with a calendar and the only courtroom in session. He checked it - it had more than 100 cases - but it did not contain his case. The clerk of that part told him to wait. He can't say if he told the clerk that his case was in Part 11. He went from part to part (T:1195, 1201). Ultimately, he landed in Part 11; which he thinks is on the third floor. There he was advised by the clerk that a default had been entered for non-appearance (T:1187). A motion to reopen

followed but was denied. The appeal, which he argued, was successful. He does not know what ensued because he had left the office (T:1200).

Paul S. Mirman, respondent, testified that since 1969 he has been practicing principally personal injury law. He can add nothing to the testimony adduced on the eight charges (T:1269-70).

At the end of 1980 and a good part of 1981, - at least six months - he was absent from the office for health reasons which he elaborated upon in great detail (T:1276-82). He was out "probably" until May or June on a full-time basis. But the office had continued to function very well in his absence. He was suffering from a malady known as Guillam-Barre (T:1299). He was back in the office in September 1981 on a full time basis (T:1282-86, 1287-88, 1296, 1299). But in 1984 he was out for the month of June by reason of Multiple Sclerosis (T:1288).

He is aware of the eight names in the eight charges. He is now familiar with the cases and the problems attendant upon them (T:1289). He was familiar with the cases - he knew every case in the office - but it wasn't brought home to him on a day-to-day basis. At the time of the Kantor case (Charge I), he was in the hospital. Everything was done in that case - the EBT, the physical, an 8A, and it was placed on the calendar. "We" were waiting for it to come up for trial (T:1290-91). Elaborating on the Kantor case, he said:

> ... and probably when I reviewed the file, if I looked at it or Tom looked at it, there was no indication that this case has already come up on the Civil Court calendar and was pending in the Supreme Court, according to what our file showed. (T:1291).

At the time of the Kantor case, the Civil Court Calendar was behind three-four months (T:1292).

He became aware of Kantor, Lugardo, Montana (after the appeal was decided), and Dodge after Mr. Moskovitz had received a letter from Mr. Weiner (T:1285-86) and of Zaldua at some point. In Dodge, he knew that a bill of particulars had not been served, resulting in a preclusion. He became aware of it when a letter was received from Gladstein & Weiner. He told "him" to straighten out "this problem" [with Myron Weiner] and he showed the letter to Ms. Turchin (T:1286-87).

When he testified before counsel to the Grievance Committee and also when he submitted an answer, he never raised his absences from the office as an issue. In all the matters covered by this proceeding he was the retained attorney. They were his clients (T:1302-03).

PX97 for identification - A letter addressed to respondent (T:1306). Respondent admits receiving it, a letter of

caution from the Disciplinary Committee. He sent a letter in reply (T:1316-17).

PX98 for identification - A letter from the Grievance Committee (T:1318).

PX99 for identification - A letter of caution (T:1320).

PX100 for identification - A letter of caution (T:1322).

PX101 for identification - Letter of caution (T:1322).

PX102 for identification - Letter of caution (T:1323).

PX103 - Letter of caution (T:1324).

Referee's Findings

Charge I - re: Irma Kantor

"The law's delay" --

Shakespeare's Hamlet,
Act III, Scene 1

This case, commenced in the Supreme Court, was transferred to the Civil Court pursuant to CPLR §325D. The office diary

does reflect the transfer but nothing in respondent's file does (T:1359-60).

On January 28, March 7 and finally June 1, 1981, the case appeared on the Civil Court trial calendar. Not one of these dates is reflected in respondent's file though they are recorded in the office diary (T:1347, 1349-50). "Nobody looked at it [the diary]." No explanation is offered for this failure to look at the office diary. But there is no entry in the diary recording the fact that the case did not appear on the June 1 court calendar (T:1355). No effort was made by respondent to ascertain why the case did not appear on the June 1 calendar. So the case remained in limbo until Mrs. Kantor, on June 16, 1983, complained to respondent and to the Grievance Committee. The Grievance Committee notified respondent. It was only thereafter that respondent sought to remedy the situation by a motion to restore the

case to the calendar (T:268-71, 1280-1303).

Respondent testified that the office files are systematically reviewed from A to Z at least three or four times a year. "When we finish with the Z, we start from the beginning" (T:246, 267). Of what utility was this review if the file lacked the bare and essential facts of the progress of the case on the court calendar?, if it lacked the dates the case appeared on the calendar? Respondent's employee, Tom Markovitz, conceded this point:

> REFEREE: Nothing in the file about the Civil Court?
>
> WITNESS: No sir.
>
> REFEREE: Nothing in the file that it had appeared on the Civil Court calendar several times?
>
> WITNESS: No, if there had been such a notation, the problem may never have arisen but there is nothing in the file to indicate that. (T:1135-36).

This point was pointedly highlighted by the following cross-examination:

Q.: What is the sense in having a file if it doesn't record the day-to-day occurrences in that court?

A.: We just haven't maintained the files in that fashion. We keep our medical records, our pleadings, orders, you name it, in the files, but as far as court dates, we have not in the past kept those. (T:1351).

Finally, when asked if there was anything in the office's procedure "that would have brought this problem to your attention if it hadn't been for Mrs. Kantor's call?," the lame excuse was: "Ultimately, file review, somebody bringing it to another's attention. That's what" (T:1921).

Respondent testified that after an illness he was back in the office on a full-time schedule in September 1981 (T:1290). Mrs. Kantor's letter of complaint was dated much later - June 1983. He was responsible for the method of file maintenance by his office, regardless of

any temporary illness. He testified relative to Kantor:

> And probably when I reviewed the file, if I looked at it or Tom looked at it, there was no indication that this case had already come up on the Civil Court calendar and was pending in the Supreme Court, according to what our file showed (Emphasis supplied; T:1291).

For approximately two years, respondent failed to process this case. He failed to take any steps to remedy the situation until after notification by his client. His record-keeping was such that he would never have known of the problem until his client called it to his attention.

This case is an instance of the "law's delay" lamented in Hamlet's famous soliloquy. It is rather an instance of an unjustified lawyer's delay. I find that the charge has been proven by a preponderance of the evidence.

Charge Two - Castillo

No answer was interposed to the summons served by respondent. When respondent had not taken a default judgment within one year, the defendant moved under §3215 CPLR to dismiss the complaint for respondent's failure to do so.

By reason of respondent's non-appearance, the motion was granted. Respondent's associate had arrived late for the calendar call. Thereupon, respondent promptly moved to vacate the default. On May 15, 1984, defendant's motion to dismiss was granted but without prejudice to an application by respondent to renew its motion "on submitting an affidavit of merit," terming that "a basic requirement which cannot be overlooked" (PX19). But significantly the court added:

> On June 8, 1983, the plaintiffs wrote to the defendant's insurance carrier advising them that the defendants were in default. At that time the statute of limitations had expired and the defendant's insurance carrier respondent with a motion to dismiss ...

> The Court will now address the motion to dismiss for failure to enter a default judgment within one year after the defendant. Section 3215(c) is based upon the presumption that the plaintiff has abandoned the cause of action by his inaction after a year from the date of default of defendant. In this case, however, it appears that the plaintiff's counsel did not abandon the cause of action. Before an application was brought by the defendants, plaintiff's counsel wrote to defendant's carrier requesting that they appear on behalf of the defendant. In fact, it would appear that this very motion to dismiss the complaint was stimulated as a result of plaintiff counsel's letter. It seems to be an unjust result to dismiss the plaintiff's complaint while plaintiff's counsel was doing his best to avoid a default judgment against the defendant and his insurance carrier.

We note that respondent's opposition papers cited by the court state:

> Annexed hereto and made a part hereof as Exhibits are copies of correspondence between your affirmant and the carrier for the defendants herein which confirm that on numerous occasions the defendants have been

> informed of plaintiff's intention to take a default if defendants continue to ignore plaintiff's complaint ...

RX AY consists of three letters - one dated June 8, 1983 to Aetna and two dated June 8, 1983 and October 27, 1983 to Geico - in which respondent refers to his service of a summons "some time ago" and stating that if an answer is not received within 20 days, a default judgment would be entered.

Respondent thereupon renewed its motion by submitting an affidavit of merit from Milagros Castillo in which she listed her injuries and those of the other five passengers in the car (PX21C). An affirmation in opposition referred to the fact that although there were seven plaintiffs, only one affidavit of merit had been submitted, and that with respect to the other plaintiffs, the affidavit was "hearsay." PX22.

A reply affirmation by respondent attached another affirmation by Magdalia

Castillo and her son. Magdalia is the wife of the plaintiff Daniel Castillo and a sister of another plaintiff and respondent contended that the plaintiff, Milagros Castillo was familiar "by way of personal knowledge with her family's injuries and expenses" and thus did not constitute hearsay.

PX23A - The order of Judge Bernstein, dated August 5, 1984, follows:

> Motion denied on the grounds that the plaintiff has not submitted a sufficient affidavit of merit for all the plaintiffs. In order to have an affidavit of merit the affidavit must be made by someone having knowledge of the facts. It must be someone having knowledge of the facts. It must be made by someone having knowledge that the injuries sustained by the individual plaintiffs permit the plaintiffs to bring this action under no-fault law. (PX25)

Respondent conceded that "it does not say, quote, doctor's, closed quotes, ..." and that this was respondent's interpretation (T:929).

By order of October 2, 1984, Judge Bernstein denied respondent's motion to vacate the dismissal (PX26).

Petitioner and respondent posit differing interpretations of Judge Bernstein's order. Petitioner asserts that Bernstein simply was insistent that each complainant submit his own affidavit of merit. On the other hand, respondent contends that Bernstein was referring to a doctor's affidavit since a doctor would be in the best position to know whether or not the injuries sustained by the individual plaintiffs permitted them to bring the action under no-fault law (T:937).

It is true that Judge Bernstein's decision does not specifically refer to a doctor's affidavit, contrary to respondent's initial testimony. On the other hand, it cannot be foreclosed that this was not an unreasonable interpretation of his decision. Upon Aetna Insurance Company's disclaimer of insurance for the

defendant's car, respondent decided not to pursue the legal action further but to resort to an uninsured motorist proceeding, and which resulted in a recovery. The doctor's bills were in a relative low range (T:314, 366-67, 369-71). The injuries did not involve any fracture (T:314, 366-68, 372). It is true that nowhere did the judge state that the two affidavits of merit already submitted did not constitute affidavits of merit. It may well be argued that the decision was ambiguous. But an interpretation of a judge's decision by a lawyer, though one may disagree with the interpretation, it is submitted should not be the basis for a ruling in a disciplinary proceeding adverse to an attorney unless the interpretation is patently and grossly erroneous.[15]

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[15] See Grago v. Robertson, 49 A.D.2d 645, 646, 370 N.Y.S.2d 255 (3d Dep't 1975): "[T]he attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment where

Accordingly, I find that this charge has not been proven against respondent by a preponderance of the evidence.

Charge III - Lugardo

On April 8, 1983, defendant served upon respondent a demand for a bill of particulars (PX32-a). Respondent made no request for an adjournment. "Well, it just wasn't necessary in our opinion to do that. It wasn't something that was routinely done" (T:420)

> THE REFEREE: They could move to preclude then, couldn't they?
>
> THE WITNESS: They could. However, in our experience, a court would grant a conditional preclusion order, which is what was done here. (T:420).

On June 7, 1983, defendant's counsel wrote to respondent:

> In order to obviate the necessity of making a motion to preclude in the above entitled

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the proper course is open to reasonable doubt."

> action, would you kindly serve your verified bill of particulars at this time, as same was demanded in April 8, 1983. (PX35).

Someone in respondent's office made a notation B/P on the above letter. However, a bill was not prepared at that time since it was not until August 29, 1983 that all the physician's reports were received. Up to that time, only one report had been received for a fractured nose.

On September 12, 1983, a conditional order of preclusion was entered, PX37a-b. It was granted on consent, unless a bill of particulars was served within 60 days of the service of the order, namely, December 1, 1983. However, respondent did not serve its bill of particulars until December 14, 1983 - 13 days late. (T:423, PX39). On December 21, 1983, the bill of particulars was rejected as "untimely" in a letter from the defendant (PX40).

By motion, dated March 14, 1984, respondent sought to extend the time in which to serve his bill of particulars. PX41a-b. The excuse offered for his tardiness was that "plaintiff was only late in serving said bill of particulars by 12 days." (PX41, p. 3). On May 16, 1984, the motion was denied and the defendant's cross-motion for summary judgment was granted and the complaint was dismissed. PX43a. On June 27, 1986, respondent's motion to renew his motion to extent the time to serve a bill of particulars was denied (PX44). Thereafter, on April 15, 1984 on appeal to the Appellate Division, Second Department, the lower court ruling was affirmed. PX45a. The Appellate Division stated in part:

> Plaintiffs failed to demonstrate that the lack of compliance with the terms of the order was excusable. Specifically, although there are four plaintiffs in this case, there were no extensive records to be compiled or persons to be in-

> terviewed due to the limited nature of the parties' injuries and medical treatment ... Moreover, plaintiffs' counsel did not contact the attorneys for the defendant to advise them of the reason for the delay, did not make a motion within the 60-day period for an extension, and failed to supply a sufficient affidavit of merits in opposition to the cross motion for summary judgment upon the noncompliance with the preclusion order ...[16]

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[16] Respondent challenges this and other Appellate Court decisions on the ground of equitable estoppel. Respondent has every right to dispute these decisions but he cannot challenge them on the theory of equitable estoppel. I believe this is an erroneous application of that principle. See: Ryan vs. New York Telephone Co., 62 N.Y.2d 494, 478 N.Y.S.2d 822 (1984), which expounds the principle as follows:

> ... the doctrine of collateral estoppel [is] applicable to give conclusive effect to the quasi-judicial determination of administrative agencies when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law ...

The first answer, received on April 8, 1983, incorporated a demand for a bill of particulars; the second answer was not received until November 14, 1983. Respondent concedes that he did not communicate with the defense attorneys after receipt of the first answer (T:414, 419). A bill of particulars was not prepared by respondent until October 10, 1983 - after the receipt of an order of preclusion. On the jacket is the notation: "10-10-83, B/P" in Jeffrey Schwartz's handwriting, and signifies the date he dictated a bill of particulars (T:418). A 60-day consent preclusion order had already been served on respondent, with notice of entry dated September 27, 1983, and the

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> The doctrine of equitable estoppel ... precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity whether or not the tribunals or causes of action are the same.

bill of particulars had to be in the mail no later than December 1, 1983. However, respondent offers the following reason for not mailing the bill of particulars until December 14.

Jeffrey Schwartz's dictation of a bill of particulars was not placed in the file. However, on November 14, 1983, a new answer from the defendant came in (apparently for a third summons and complaint). A second summons and complaint, dated March 29, 1983, had been prepared to correct an error in the first complaint - the omission of one party plaintiff. In October 1983, a third summons and complaint were served as an extra "precaution" because of the affirmative defense of non-service (T:410-11). When the new answer of November 14 came in, the file was pulled by a clerk out of the dictation stack - which was not in accordance with normal office procedure. Respondent saw the file; his handwriting is on it. When it was realized that

there was a 60-day preclusion order in the file, the writing of a bill of particulars was re-assigned to Michael Palillo, a law clerk. Since a bill of particulars had already been prepared by Schwartz, why was there a re-assignment to Palillo? But instead of drafting a bill, it is alleged that Palillo phoned the defense attorney, Rubin Nadler, for an extension of time (T:421, 427). Not consenting to an extension, the attorneys drafted a motion to dismiss. There is, however, no evidence to support this alleged phone call, which was controverted by defense counsel (RXI) and concerning which Palillo in his testimony drew a blank - he had no recollection whatsoever of the entire matter (T:648).

On December 14, 1983, Palillo wrote out an affirmation in respondent's name in opposition to the defense motion to dismiss for failure to serve a bill of particulars. It was then typed up and signed (T:428). Reference is made there-

in to Palillo's phone call: "We contacted the office ..."; "we requested an extension ..."[17] (underlining supplied) (RX8).

Although respondent contends that he drafted a bill of particulars on October 10, it had still not been typed and served by November 14 when respondent received a new answer. Why was the drafting of a bill then reassigned to a new man, Palillo, a law clerk, when it had already been drafted by Schwartz, an attorney with more experience? Respondent's judgment is seriously called into question and impugned, particularly when confronted with a preclusion order, by the following testimony:

> Jeffrey Schwartz was given this on October 10 of '83 and he was able to draft a bill of particulars. He didn't have any problems. It would have gone out and been accepted in a timely fashion.

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[17] The testimony was that of Ms. Turchin, the chief witness for respondent regarding all the charges herein.

> Michael Palillo was a different person. Apparently he had trouble, although - doing it. There are only 11 questions or 16 questions. They are not that hard or difficult; how old is somebody; and what date did accident happen, but he had a problem when it came to the injuries. (T:490).
>
> ... There is no doubt in my mind that Jeffrey Schwartz, we (sic!) he dictated that bill of particulars, wrote in there on October 10, 1983, "Unknown at this time and will be provided when it become available." But again, that's one person. Michael Palillo, when he got it, wasn't even approximately one month later, didn't understand or comprehend that he could write the bill of particulars that way and just leave open those three spots that say "unknown at this time and to be provided..." (T:493).
>
> ... It is a simple straight forward car accident with minor injuries that any person, even a second or third year law student should be able to do a bill of particulars on. But this is what happened. (T:494).

By letter of August 27, 1985, petitioner wrote respondent of his failure to

notify his client of the dismissal of his action by the Appellate Division (PX66). In his reply of September 23, 1985, respondent advanced his rationale why the action is dead (PX47) but that he would honor petitioner's opinion and notify his client (PX67).

Almost a half year after receipt of the first demand for a bill of particulars and after the entry of a Consented Preclusion Order, a fledgling law clerk, confessedly inexperienced, was assigned this task, respondent knew of the preclusion order. The testimony by Ms. Turchin establishes that when it was realized there was a preclusion order, after the alleged failure in office procedure, the task was assigned to an admittedly inexperienced law clerk.

Finally, respondent admits he did not advise his client of the Appellate Division dismissal of the action until after he had received the complaint,

although he seeks to explain his failure to do so.

I find that this charge has been sustained by a preponderance of the evidence.

Charge IV

In 1978, respondent was retained by another attorney to represent Ramon Montana, an infant who had sustained a fracture of the tibia in a staircase accident and with whom respondent never had any contact (T:582-83). A property search disclosed that David Gechter was the owner of the property and a summons and complaint were served on him. As no answer was received, a second title search confirmed the first, the summons was then re-served on Gechter (T:590-91). Since the complaint had not been verified, respondent was barred by statute from entering a default judgment (T:593).

On the exterior of respondent's file appears the following notation: "8/30/82

come in." Respondent testified that the client was written to on that day and a carbon copy was mailed to the referring attorney (RXV, T:595). There is no correspondence in the file between respondent and the referring attorney for the period 1978-81, nor of any correspondence with respondent's client (T:615-16). Respondent testified that on or about April 1984 the file had been closed, as attested by the notation "Box 3" on the file cover. Respondent retained only those documents required by the Appellate Division Rules, "so correspondence was not kept" (T:616-17). "There is nothing in the Appellate Division rules that letters other than those that relate to payment of the claim or disbursements are to be kept in the file once the file is closed. That is in the Appellate Division rule" (T:617). This is not quite accurate, because the Appellate Division rule also contains the requirement for preservation of "all correspondence con-

cerning the claim or cause of action." Rule 691.20(f) of the Rules of the Appellate Division, Second Department. Petitioner has made an issue of the absence of these letters. Tom Markovitz, respondent's employee, recalled that "there must have been five or six different letters to the client to their last known address, all of which came back" (T:1156). My interpretation of the Appellate Division Rules regarding the preservation of letters would not cover letters to a client to come in to the office since, strictly speaking, it does not relate to the claim or cause of action but merely to a requested appearance of a client at the attorney's office. Whether respondent acted prudently in this regard is not the issue. I accept respondent's explanation regarding the absence of the letters. Although by the above-cited Rules respondent was required to maintain "the pleadings and other papers pertaining to such claim or cause

of action," I find that his failure to retain these is a technical violation of the Appellate Division Rules, which I call to the Court's attention. But I also accept respondent's explanation that the summons and complaint - which are not in the file - must have been forwarded to the client because that is the office routine (T:968).

In October 1981, respondent ordered a third title report - a 20-year title search - to "see if we could do something about taking a default, to check the ownership" (T:951, RXR). The report, dated October 8, 1981, showed David Gechter still to be the owner of record but further stated, "Deed unto City of New York 12-27-73. When taxes paid, will revert to David Gechter" (T:598). Although the property was transferred several times after 1973, the thus the City could not be the owner at those periods, the City never filed a "vacate order" (T:601). A clerk, however, erred by

stating on the abstract "when taxes paid, will revert to David Gechter" (T:602). It was not until 1982 - years after the institution of action herein - that Gechter failed to pay his taxes and the City took it over in an in rem proceeding (T:608). The City owned it from 1983 to 1976 and in 1982 (T:608). But in 1978 - the date of the claim herein - Gechter owned it (T:688). However, when respondent received the third title report, it appeared to respondent that he had as a defendant, the City of New York (T:603).

Respondent then prepared a motion to serve a late notice of claim upon the City of New York (T:603). A Supreme Court Judge granted the motion "in the interests of justice" (PX53a). The judge stated, "The claimant-petitioner had used his best effort to determine ownership of the parcel of land immediately after the occurrence of the accident... From the papers submitted in support of this motion it is obvious that claimant attempt-

ed to pursue this action in an expeditious and timely fashion." However, the Appellate Division reversed on the ground that the City was prejudiced "since it never received notice of the accident which occurred over three years before petitioners filed their motion for leave to serve a late notice..." But as heretofore indicated, David Gechter was the owner of the property, not the City, as erroneously set forth in the 1981 title report.

We note, in passing, that contrary to the Appellate Division statement, after determining in October 1981 that the City was the owner, respondent expeditiously noticed his late claim notice for November 30, 1981 but that it was adjourned several times at the request of both parties (PX52a).

I find that this charge has not been sustained by a preponderance of the evidence. However, I call to the Court's attention the fact that respondent has

not preserved the summons and complaint, as required by Rules of this Court.

Charge V - Dodge

Renee Dodge sustained injuries on New York City Housing Authority property (T:765). On February 24, 1982 a summons and complaint were served (T:955, PX57). On April 6, 1982, the defendant served upon respondent an answer and a demand for a bill of particulars, to be served within 10 days (PX58, 59a). The answer further included an affirmative defense that the summons and complaint were a nullity (T:956). Respondent concurred in that opinion; for that reason respondent did not supply a bill of particulars (T:1169, 1229). Thereafter on July 30, 1982, a 60-day preclusion order on consent was entered (PX60). The motion for the preclusion order is dated May 27, 1982, returnable June 10, 1982. Respondent did not then raise the issue that the summons and complaint were a nullity

(T:957, T:1229-30). The preclusion order was served on August 12, 1982 and the bill of particulars was due about October 17 or 18. Respondent did not supply a bill of particulars (T:1231-32).

On June 29, 1982, a hearing on the summons was held by the Housing Authority. On July 13, 1982 respondent served a second summons and complaint - identical with the original ones - upon the defendant (T:957, 1232), without sending along a stipulation of discontinuance. A stipulation of discontinuance was for the first time mailed to defendant on January 13, 1983 (RXAA). Respondent never received an answer to the second summons and complaint (T:966). In January 1983, the defendant made a motion for summary judgment based upon respondent's failure to supply a bill of particulars pursuant to the preclusion order (T:958, 1233) and it was granted by order dated March 22, 1983 (PX61a). Respondent did not oppose the motion (T:1235, PX61a). Respondent

contended that there was no need to oppose the motion, since he had called defendant who agreed to withdraw the motion (T:1235). But on February 7, 1983, more than one month before the motion was granted, respondent already knew by the reply letter of defense counsel that he was not withdrawing its motion for summary judgment (See infra). RXAA is a letter, dated January 13, 1983 from respondent to Gladstein & Isaac, attention of Myron Weiner. It reads:

> Pursuant to our telephone conversation of this date I enclose a stipulation discontinuing the action commenced on February 24, 1982 prior to the municipal hearing held in this matter on June 29, 1982, which would be a nullity under the Municipal Law.
>
> Accordingly, kindly withdraw your motion pending in the first action for summary judgment returnable February 3, 1982, in Supreme Kings, Pt. I.
>
> I also enclose a copy of the second summons and complaint served on July 13, 1982 after the municipal hearing was held in this action. You owe us an

> answer to this summons and complaint. This is the only proper viable action pursuant to the Municipal Law.
>
> To save time I am also enclosing a bill of particulars and a reply to your demand for D&I Served in the first action as I am sure your demands will be identical in the second action.
>
> Thank you for your cooperation in this matter. (RXAA).

On February 7, 1983 respondent received defendant's reply from the office of Gladstein & Isaac, dated January 31. RXAB. In that letter, respondent's purported bill of particulars was returned since it was served untimely with the advice that defendant was not withdrawing its motion for summary judgment returnable February 3. "Furthermore the summons and complaint served upon the Housing Authority on July 13, 1982, is identical to that previously served on February 26, 1982, to which you were served with our answer on or about April 6, 1982." (RXAB). Respondent contends that

defense counsel in effect reneged on an agreement to withdraw the motion for summary judgment (T:1170-71). The motion for summary judgment was submitted (T:1236). Respondent submitted nothing to the Court, the motion was granted by default. Respondent sent no letter to the Court relative to an understanding with opposing counsel, stating "They are now reneging on their agreement. I'd like to submit opposing papers" because "I find that is not effective because generally, they say make your motion." He made no motion to extend his time to submit a reply because: "I didn't feel I needed to. I had a valid action that I was trying to get an answer to." (T:1237). On the bottom of RX AB, supra, Thomas P. Markovitz wrote for his own satisfaction: "You miss the point. It's a new action. You got to put in ans. Stupid" (T:1239). In May, he wrote defense counsel again, after the granting of summary judgment, asking that an an-

swer be interposed to the second summons of July (T:1247).

> Q.: It's your testimony that even though the court granted summary judgment and dismissed the complaint in the action of Renee Dodge vs. the New York City Housing Authority, you felt that had no bearing on the second case?
>
> A.: Absolutely (T:1240).

The Appellate Division, Second Department on March 4, 1985 (PX62b) affirmed the dismissal of this case.

> Plaintiff failed to serve a bill of particulars upon the defendant within the 60-day time limit imposed upon her by conditional order of preclusion, and her action was dismissed. Her subsequent service of an identical summons and complaint upon the defendant did not properly commence a second action but was merely an improper attempt to evade the consequences of the preclusion order ... The fact that the original action could have been dismissed as premature pursuant to General Municipal Law §50-b(5) did not render it a nullity.

Respondent's motion for a default based on the second service was denied, as was a motion to vacate the order of preclusion and summary judgment (T:1172).

In respondent's letter of September 23, 1985 to the Grievance Committee (PX63), he wrote:

> We moved for leave to appeal to the Court of Appeals by notice of motion dated June 3, 1985. A copy of the notice of motion is annexed hereto.
>
> By letter dated June 7, 1985 we were advised by the Court of Appeals that an order to vacate a default order of judgment does not appear to be one fulfilling the finality requirements of CPLR 5012(a)(0)." A copy of this letter is annexed.

Respondent took no steps to receive an answer to his second summons and complaint which had been served on July 13, 1982. In January 1983, a motion for summary judgment based upon the preclusion order was made. A half year elapsed since respondent's second summons and complaint with no action having been

taken by respondent to obtain an answer. As a matter of fact, respondent never received an answer to the second summons (T:966). Respondent then defaulted on the motion for summary judgment and a preclusion order was dated March 22, 1983. The Appellate Division reasoned that the second service of a summons herein was "merely an improper attempt to avoid the consequence of the preclusion order." The motion for a preclusion order is dated May 27, 1982 and the second summons and complaint was served thereafter on July 13, 1982. This formed the basis for the Appellate Division's reasoning that the second service was a dodge in an attempt to avoid the consequence of a preclusion order.[18]

This is not simply a case involving a "well-grounded but unsuccessful de-

[18] Respondent's reference to the preclusion order as not being in existence until July 30, 1982 overlooks the fact that it is dated May 27, 1982, returnable June 12, 1982 (T:1229).

fense," as contended by respondent. If it were, I would rule in favor of respondent. But respondent incredibly allowed the Court to enter summary judgment and preclusion orders, interposed no objection, and never attempted to present its position to the Court.

I find that the charge has been sustained by a preponderance of the evidence.

Charge VI - Zaldua

Legal action on a bus-related injury was commenced by respondent on March 13, 1979, after service of a notice of claim. Issue was joined on April 3, 1979. The venue was thereafter changed from Kings to Nassau County.

On April 15, 1981 a pre-trial conference was held in Nassau County in respondent's absence. Defendant's attorney mailed to respondent a scheduling order for an examination before trial to be held on May 11, 1981 (PX73a&b). On

the return date (May 11), neither respondent nor his client appeared (PX75). Thereafter, by motion returnable July 27, 1981, defendant moved to dismiss the complaint (PX76-a). Respondent submitted an affirmation in opposition, contending that the case had been adjourned by mutual consent to August 14, 1981 (PX77). By order dated August 24, 1981, defendant's motion was denied on condition that respondent pay $250 sanctions to defendant's attorney for failure to comply with the court's order of April 15, 1981. Further, an examination before trial was to proceed on September 14, 1981. Should respondent fail to comply with the conditions of the order, the motion to dismiss would be granted (PX74). Thereafter, on November 10, 1981, defendant's motion to enter judgment against respondent for failure to comply with the prior order was granted, "there being no opposition thereto" (PX78). On December 28, 1981,

judgment dismissing the complaint was entered (PX79).

By motion dated August 25, 1982, respondent sought to vacate the above judgment (PX80a). He referred to Mrs. Zaldua's "permanent injuries." Respondent contended:

> Mrs. Zaldua, at the time of the scheduled examinations before trial, lived in Queens, with the IA conference called for the examination before trial in Nassau. (PX80a)

Further, respondent stated with respect to the examination scheduled for May 11, 1981, his office discovered that it was impossible for Mrs. Zaldua to get transportation on that day, so that he arranged with defendant for the adjourned date of August 14. Nevertheless, defendant's attorney and his witness appeared on May 11. Mrs. Zaldua appeared alone in court on August 14. However, on July 13 defendant had moved for a dismissal and by order of August 24, the examination before trial was set for September 14.

Respondent then retained outside counsel, Kenneth Agolia, Esq., to handle the examination before trial. On August 17, 1981, before respondent was advised of the rescheduled September date, Mrs. Zaldua had returned to Colombia, South America. A motion to dismiss the complaint, dated October 14, 1981, was granted on December 28, 1981 (PX80a). It was not until May 1982 that respondent heard from Mrs. Zaldua. At the time of defendant's motion to dismiss, Mrs. Zaldua was in South America. "Our request for an adjournment somehow was not granted by the Court and the motion [to dismiss] was granted on default." Since Mrs. Zaldua was not available, respondent requested that the judgment of dismissal be vacated (PX80a).

Respondent's motion to restore the case was granted. On appeal to the Appellate Division, by order dated November 28, 1983, that order was reversed. The Appellate Division observed:

> ... What followed (after 1979) was over three years of laxity and neglect on the part of plaintiff's attorneys. Depositions were scheduled and adjourned at plaintiff's attorney's request on 16 separate occasions over a course of two years. Then there ensued three scheduled court-ordered depositions at which plaintiff's attorneys never appeared and plaintiff appeared once. In the meantime, plaintiff's attorneys did not submit a bill of particulars until ordered to do so by the court, only partially complied with a court order compelling discovery, failed to pay sanctions imposed by the court and failed to attend a pre-trial conference. (PX82).

Respondent's file does not reflect the scheduled deposition dates nor any letters sent to Mrs. Zaldua. Nor did respondent have an office calendar (T:982-83). Respondent could not produce any letters sent to Mrs. Zaldua regarding deposition dates. Respondent explained that the file was closed and letters were not preserved thereafter (T:1010). However, in PX96, the chronology of sched-

uled depositions prepared by the defendant reflects adjournments for depositions over a period of 27 months, nearly all attributable to respondent. Respondent contended that they were all on consent (T:1210).

Respondent cannot seek mitigating refuse in a claim that this was a situation brought on by a traveling client - during a period of a half year or more. This case stretched over a period of more than two years. About 10 months after the dismissal of the action respondent moved to vacate the judgment herein (PX80a). Though the motion was granted, it was reversed on appeal. The Appellate Division wrote, inter alia:

> What followed was over three years of laxity and neglect on the part of the plaintiff's attorneys. Deposition were scheduled and adjourned at plaintiff's attorney's request on 16 separate occasions over a course of two years. Then there ensued three scheduled court-ordered depositions at which plaintiff's attorneys never appeared and plaintiff

> appeared once. In the meantime, plaintiff's attorneys did not submit a bill of particulars until ordered to do so by the court, only partially complied with a court order compelling discovery, failed to pay sanctions imposed by the court and failed to attend a pre-trial conference. (PX82).

Appellant indulged in a mea culpa when he wrote in his brief to the Appellate Division as follows:

> There is no question here, we apologetically confess, that plaintiff's attorneys did not act with the greatest dispatch in handling this case. For that, we have been penalized. (PX81, p. 3).

I note respondent's explanation regarding this mea culpa in his letter to the Grievance Committee (PX83):

> At Special Term and on appeal, I attempted to shoulder the full blame on myself, as the law has always been more lenient to lay litigants than to attorneys. To come forward and blame a client is a death knoll for a case. The Appellate Division, however, clearly understood that the plaintiff herself was not truly interested in pursuing her case and had

> abandoned it; in the middle of everything plaintiff left the country. (PX83, pp. 4-5).

In which of the two statements is one to place credence?

Respondent contends that Zaldua's injuries were major ones.

> Plaintiff Magaly Zaldua's injuries were so serious and disabling that they prevented her from working for months after the accident, made her job as a house cleaner intolerable, and ultimately compelled her to seek the comfort and care of her relatives in Columbia, South America, for several months respite. (PX81, p. 2).

In contradiction to respondent's claim of major injuries, Ms. Turchin in her testimony asserted to the contrary:

> That point, I feel, is important that we know that we have to put the case in context; that is, we are dealing with a Hispanic woman in a Nassau court with a small case of limited value. (T:828).

If Ms. Turchin's assessment is accurate, could that have contributed to

respondent's lackadaisical attitude in connection with court appearances?

I find that this charge has been sustained by a preponderance of the evidence.

Charge VII - Austin

Respondent filed a notice of intention to make claim pursuant to the client's uninsured motorist coverage and demanded arbitration (T:831). The insurance carrier, claiming that the offending vehicle was insured, petitioned to stay arbitration, and further that respondent had failed to serve a timely notice of its intention to file an uninsured motorist claim (PX86 at 5, T:834, 1174-75). By order dated August 15, 1983, the issue was placed on the trial term calendar for a hearing (PX86 at 26). According to respondent, the order dealt only with the issue of coverage and excluded specifically the issue of timely notice. After two adjournments, the matter was marked

"final" and calendared for November 22, 1983 (RX AG, T:835). On that date respondent's office did not appear on the calendar call. Judgment was entered against Austin, permanently staying arbitration (PX86 at 38, PX87). Respondent contended that his representative was delayed on another matter. However, the representative had no recollection whatsoever of the matter (T:677). This fact alone, however, is not dispositive of the case, though Palillo's lack of total recall casts a shadow on the case.

By notice of motion, returnable January 6, 1984 (PX86 at 27), respondent moved to vacate the order staying arbitration. On January 23, 1984, the motion was denied

> without prejudice and with leave to renew upon submission of transcript of proceedings before this court in the captioned matter on November 22, 1983. In addition an affirmation shall be furnished from the attorney assigned to this matter on the above date setting forth therein a valid

> excuse for failing to appear both at the calendar call and in the trial part.

Respondent moved to renew his prior motion by notice of motion returnable April 23, 1984 (PX86 at 59). Accompanying the papers was an unsigned affidavit of Michael B. Palillo (PX86). The motion was denied.

> The excuse offered by respondent for failing to appear by an attorney on the scheduled hearing date is grossly inadequate. It exemplified inexcusable law office failure, and is compounded by the fact that the within affirmation by the attorney, assigned to the matter is unexecuted. (PX86 at 4)

On April 8, 1985, the Appellate Division denied an appear on the ground that "appellant failed to offer a valid excuse for his default, as required by CPLR 5014(a)(1) (PX87b).

Several issues have been presented by petitioner. One issue is that petitioner disputes respondent's contention that Judge Lerner's order setting the

matter down for a hearing on "the issue of coverage" bars a consideration of the issue of timeliness which was also raised by respondent's insurance company. Judge Hyman, we believe, correctly interpreted Lerner's phraseology to mean that the "issue of effective cancellation and timely notice of intention to make claim under the uninsured motorist endorsement of an insurance policy both fall within the ambit of coverage issues to be heard and resolved by the trial court" (PX86 at 4). But the mere fact that respondent may have misinterpreted Judge Lerner's order does not, I submit, involve an issue of neglect of duty with which respondent is charged.

The second issue raised by petitioner is that Mr. Palillo who was assigned to appear in court to answer the calendar call was not yet an attorney. It is true that the case had been marked "final"; but there can be no objection to a clerk

answering a calendar call; that does not mandate the appearance of an attorney.

Another issue raised by petitioner centers about Mr. Markovitz's affirmation of December 14, 1983 (PX86 at 32), wherein he refers to "your affirmant appeared on each of those occasions" in court to adjourn the matter. But that paragraph previously had referred to: "your affirmant's office" and it can readily be understood that the phraseology "your affirmant" need not necessarily have meant Markovitz himself but someone from affirmant's office in whose behalf he drafted the affidavit. I do not regard this as a "blatantly misleading statement." Furthermore, the reference to Palillo as "an attorney" (PX86 at 33) while he was awaiting admission after having passed the bar examinations (T:1246) could mislead no one. At worst, it was "sloppy," as Markovitz admitted (T:1244).

Petitioner claims that Palillo did not sign the affidavit he submitted to the court because Judge Hyman's order called for an affirmation from the "attorney" who appeared late in court on the matter and Palillo was not yet an attorney then. This, I believe, is stretching Hyman's meaning beyond its purported intention, namely, an affidavit from a representative of respondent's office who appeared in court. The submission of an unexecuted affidavit is, of course, inexcusable but it could very well have been an oversight rather than a nefarious scheme.

Respondent may have been somewhat "slipshod" in this case but I am not convinced that he intended to pull the wool over the Court's eye - to "deceive the court."

I find that this charge has not been proven by the preponderance of the evidence.

Charge VII - Gonzalez

Respondent demanded arbitration for his client Raymond Gonzalez, pursuant to the latter's uninsured motorist coverage (T:880-81, PX92 at 15). On February 4, 1983, the carrier's application to stay arbitration was granted, pending determination of whether the offending vehicle was insured (PX92 at 20). On June 3, 1983, the case appeared on the calendar. According to the judge presiding in the trial part, the case was adjourned several times due to respondent's failure to appear. On October 24, at respondent's request, the case was adjourned to November 23, 1983 with an admonition by the court that failure to appear would result in the granting of the petitioner's requested relief (PX92 at 8). Upon respondent's failure to appear on November 23, judgment was entered upon default, and arbitration was stayed permanently (PX92 at 4). According to respondent, his representative, a law clerk, had gone to

the wrong part. In his decision, Judge Ostraub wrote that the rules of Part XI, where this case was calendared, required the presence of an attorney to conference or try a case. The parties had been so advised one month previously. Six adjournments had been granted at respondent's request and therefore the Court concluded that it must be assumed respondent was not prepared for trial.

On February 14, 1985, the Appellate Division, First Department, vacated the default order provided respondent pay $1,000 costs (PX93b). The Court noted:

> ... with disfavor the deliberate flouting of the rules of Part XI by appellant's counsel and would agree that such dilatory conduct is inimical to the orderly administration of a trial calendar. (PX93b)

Respondent sent his law clerk to court on a matter marked "final" when he had been specifically advised by the court previously that an attorney must appear. In addition, six adjournments

had already been granted, several times due to respondent's failure to appear. Respondent's clerk arrived late at a hearing marked "Final." The case had been marked "peremptorily" against respondent (PX93b). For an appearance marked "Final," respondent sent to court a law clerk who had never been sent to court previously and who, if he is to be believed, floundered about the courthouse, though he had been given specific instructions regarding the court part he was to proceed to (T:1001-02, 1193). In the exercise of its discretion, the Appellate Division decided not to penalize respondent's clerk but to give him his day in court. However, respondent was fined $1,000.

I find that this charge has been proven by a preponderance of the evidence.

CONCLUSIONS

> The law is well established that while an attorney may not be disciplined for his employee's neglect and of which he had no knowledge ..., he may and should be disciplined for his own carelessness and failure to supervise adequately the operations of his office.

Matter of Namark, 13 A.D.2d 676 (2d Dept. 1961).

See also, Matter of Kraft, 148 A.D.2d 149 (1st Dept. 1989); Matter of Phillies, 17 A.D.2d 93, 101 (4th Dept. 1962).

Respondent's intimate knowledge of what was going on in his office with respect to each and every case is unmistakably apparent in his testimony before counsel to the Grievance Committee summarized above.

I find that Charges I, III, V, VI and VIII have been proven by a preponderance of the evidence. I further find that Charges II, IV and VII have not been

proven by a preponderance of the evidence.

Respectfully submitted,

J. MITCHELL ROSENBERG
Special Referee

December 10, 1990

DISCIPLINARY RULES

DR 1-102. Misconduct

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 7-101. Representing a Client Zealously

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through

reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.